DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-587
Title: Kelly Harrington, Warden, Petitioner
v.
Joshua Richter
Docketed: November 17, 2009
Linked with 10A114
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-15614)
Decision Date: August 10, 2009

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 9 2009	Petition for a writ of certiorari filed. (Response due December 17, 2009)
Nov 9 2009	Appendix of Kelly Harrington, Warden filed.
Dec 17 2009	Brief of respondent Joshua Richter in opposition filed.
Dec 28 2009	Reply of petitioner Kelly Harrington, Warden filed.
Dec 30 2009	DISTRIBUTED for Conference of January 15, 2010.
Jan 19 2010	DISTRIBUTED for Conference of January 22, 2010.
Feb 16 2010	DISTRIBUTED for Conference of February 19, 2010.
Feb 22 2010	Petition GRANTED. In addition to the question presented, the parties are directed to brief and argue the following question: Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under Strickland v. Washington, 466 U. S. 668 (1984)?
Mar 25 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 10, 2010.
May 6 2010	Joint appendix filed. (Statement of costs filed)
May 10 2010	Brief of petitioner Kelly Harrington, Warden filed.
May 17 2010	Brief amici curiae of Texas, et al. filed.
May 17 2010	Brief amicus curiae of Criminal Justice Legal Foundation filed.
May 28 2010	The time within which to file respondent's brief on the merits is extended to and including July 9, 2010.
Jun 22 2010	Proposal of the parties to lodge copies of the informal reply of California in No. S082167, In re Joshua Richter on Habeas Corpus.
Jul 9 2010	Brief of respondent Joshua Richter filed.
Jul 14 2010	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jul 16 2010	Brief amici curiae of California Attorneys for Criminal Justice and the California Academy of Appellate Lawyers filed.

Jul 16 2010	Brief amici curiae of Law Professors and Legal Scholars filed.
Jul 20 2010	CIRCULATED.
Jul 20 2010	SET FOR ARGUMENT ON Tuesday, October 12, 2010.
Jul 20 2010	Application (10A114) to extend the time to file a reply brief from August 9, 2010 to August 23, 2010, submitted to Justice Kennedy.
Jul 27 2010	Record received from U.S.C.A. for 9th Circuit. 1 envelope
Jul 30 2010	Application (10A114) granted by Justice Kennedy extending the time to file until August 23, 2010.
Aug 12 2010	Record received from U.S.D.C. for Eastern District of California. (1 box)
Aug 23 2010	Reply of petitioner Kelly Harrington, Warden filed. (Distributed)
Sep 7 2010	Justice Kagan is recused in this case.
Oct 7 2010	Transcripts received from Court of Appeal, Third District. (1 box)
Oct 12 2010	Argued. For petitioner: Harry J. Colombo, Deputy Attorney General, Sacramento, Cal. For respondent: Clifford Gardner, Berkeley, Cal.

PETITION
FOR
WRIT OF
CERTIORARI

No. _______ 2009

In the Supreme Court of the United States

KELLY HARRINGTON, WARDEN, *Petitioner*,

v.

JOSHUA RICHTER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In granting *habeas corpus* relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. section 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

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Kelly Harrington, Warden of the Kern Valley State Prison at Delano (the State),[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The en banc opinion of the Ninth Circuit Court of Appeals, granting habeas corpus relief, is reported as *Richter* v. *Hickman*, 578 F.3d 944 (9th Cir. 2009) (*en banc*). The earlier panel opinion, denying relief, was reported as *Richter* v. *Hickman*, 521 F.3d 1222 (9th Cir. 2008). The opinion of the district court, also denying relief, is unpublished. The order of the California Supreme Court, denying habeas corpus, is unpublished. The opinion of the California Court of Appeal, affirming respondent's criminal conviction, is unpublished. Each of these decisions is reproduced in the Appendix to this petition. (App. 1a-196a.)

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on August 10, 2009. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

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[1] Warden Harrington currently has custody of respondent.

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

Summary

Respondent Joshua Richter and Christian Branscombe were convicted of murder, attempted murder, burglary, and robbery. At trial, the prosecution's evidence showed that, in stealing a safe from a residence, respondent and Branscombe shot and injured Joshua Johnson in his bedroom—and that they shot and killed Patrick Klein, with two different firearms, as he lay asleep on a couch in the living room.

In his defense, respondent testified that he and Branscombe went to the residence, around 4 a.m., for innocent reasons, and that Branscombe entered the house while respondent waited in his pickup truck. Upon hearing gunshots, respondent said, he rushed into the house. There, he saw Johnson unconscious on the bed, Klein lying in a pool of blood on the floor by the bedroom door, and Branscombe holding a gun and screaming that "they tried to kill" him. Respondent's defense counsel posited, in argument, that Johnson shot at Branscombe with a handgun, that the bullet had struck Klein instead, and that Branscombe in self-defense then fired a second handgun and hit both Johnson and Klein.

In later habeas corpus petitions, respondent claimed that his lawyer rendered ineffective assistance in refraining from investigating and producing expert-opinion testimony that the pool of blood by the bedroom door—photographed but never tested by anybody—theoretically might have contained blood from victim Klein. In respondent's view, such evidence would have corroborated his testimony that he saw Klein lying there rather than on the couch—so that it would become less likely that Klein had been shot in cold blood, and more likely that he had been shot in the "crossfire" as Branscombe allegedly had described it to respondent at the scene. The California Supreme Court, the federal district court, and a panel of the Ninth Circuit Court of Appeals all rejected respondent's ineffective-counsel claim.

But, in a 7-to-4 opinion authored by Judge Reinhardt, the Ninth Circuit sitting *en banc* granted respondent habeas corpus relief. Even though defense counsel had cross-examined the prosecution's blood experts at trial to good effect, the Ninth Circuit held that he had acted incompetently in declining to investigate and present helpful expert testimony on the source of the pool of blood. Further—even though none of respondent's experts in the federal proceedings ever tested the blood or testified that Klein's blood in fact was present in the pool, and photographs instead showed high-velocity blood spattering on the wall by the couch—the Ninth Circuit also held that counsel's performance had prejudiced the defense. Finally, in a bare one-sentence statement, Judge Reinhardt's opinion characterized the California Supreme Court's adjudication of respondent's ineffective-counsel claim as "objectively unreasonable" so as to permit relief under 28 U.S.C. § 2254.

The Crime and the Investigation.

Late in the evening of December 19, 1994, respondent and Branscombe visited Johnson, a marijuana dealer, at his Sacramento home. Klein was also there. Johnson, who kept a .380-caliber Mac-12 semiautomatic pistol on his nightstand, noticed Branscombe cleaning a .32-caliber semiautomatic pistol. After Richter and Branscombe left, Klein went to sleep on the couch in the living room. Johnson fell asleep in his bedroom.

Sometime afterwards, Johnson awoke to see respondent and Branscombe in his bedroom taking a gun safe Johnson kept in his closet. Branscombe suddenly shot Johnson, knocking him down. Then Johnson heard another gunshot. Entering the living room, Johnson saw Klein, bleeding from an apparent gunshot wound, on the couch. Johnson's Mac-12 pistol, his hip sack containing $6,000, and his pager all were missing.

After hiding evidence of his own drug dealing, Johnson called the police. Upon their arrival, two sheriff's deputies saw that Johnson was covered with blood on his cheeks, shirt, hands, and right shoulder. They also saw Klein, lying on a sleeping bag on the couch but not breathing, with blood on his face and shoulder from an apparent gunshot wound. Later, near the couch, investigators found one expended CCI Stinger .22-caliber shell casing and one .32-caliber casing; and, in the bedroom, they found two expended .32-caliber shell casings. There was a pool of blood, just inside the bedroom, that appeared to have been disturbed, possibly by a "foot stomp"; and there was blood on the wall inside the bedroom, just above the floor molding. A sample of the blood on the wall was obtained by crime scene investigators. But no samples ever were collected from the blood pool. Another pool of blood also gathered in the kitchen where Johnson talked to the police. Johnson's pager was found in the front yard.

The day after the shootings, sheriff's deputies found Johnson's backpack and gun safe—bearing respondent's fingerprints—at respondent's house. Investigators also found several live CCI Stinger .22-caliber cartridges in two boxes and a gun magazine of a type usable with a semiautomatic handgun.

After their arrest, respondent and Branscombe were questioned separately. Respondent denied that his pickup truck had been at the crime scene and claimed that he was being set up. During a break, the police recorded a conversation in which Branscombe asked respondent what he had told the police. Respondent replied that he had told the police that he did not kill anyone and "da, da, da." Branscombe responded that he thought "we were going to tell the truth." [2] In addition, respondent's girlfriend told the police that she had talked to respondent after the shootings, but said she did not believe it would be helpful to respondent to reveal their conversation.

The Criminal Trial

Respondent and Branscombe were charged with murder, attempted murder, burglary, and robbery. At trial, the prosecution produced testimony from Johnson and from the police investigators.

In addition, the prosecution—which had never sought to analyze the blood at the crime scene until after the trial had begun—produced expert testimony from two witnesses. Jill Spriggs, a county criminalist who analyzed a sample of blood taken from the bedroom wall, opined that it could have been Johnson's but not Klein's. Detective Robert Bell, a blood-spatter expert, opined that the various blood droplets, smears, transfers, and spatter in Johnson's home were all consistent with an injured person moving about inside the house. Bell further testified, based on the blood flow patterns on the victim's face, that Klein was "on that couch fully or slightly above the couch at the time he was shot." In Bell's opinion, it was "highly unlikely" that Klein could have been shot somewhere other than on or very near the couch and then moved to the couch. He explained that, if Klein had been shot near the door to the bedroom and had fallen straight down, the victim "would have had to have been lifted straight up because we have no transfer of blood."

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[2] At trial, respondent's counsel successfully moved to suppress evidence of the recorded conversation.

Testifying in his own defense, respondent asserted that he and Branscombe had returned to Johnson's residence sometime after 3 a.m. to deliver some things to Johnson's roommate and to return Johnson's .32-caliber gun. Klein let Branscombe in through the front door while respondent waited outside in his pickup truck. Then, respondent testified, he heard "a series of gunshots." Entering the house, he saw Klein lying in the bedroom doorway; and, entering the bedroom, he saw Johnson contorted on the bed. Branscombe, holding a gun, told respondent, "They fired. They shot at me, . . . they tried to kill me." Then, according to respondent's testimony, he and Branscombe picked up Johnson's Mac-12 pistol and ran out of the house. They threw the two firearms—the Mac-12 and the .32—into a river.

Respondent's counsel called six other witnesses. They testified that Johnson's safe was already in his garage before the incident and that the incident had occurred at 4:20 a.m., rather than 5:00 a.m., so that Johnson would have had enough time to move Klein's body from the hallway to the couch and to otherwise contrive evidence to incriminate respondent.

The jury found respondent and Branscombe guilty as charged. The court sentenced them to prison for life without parole.

State Post-Trial Proceedings.

In 1998, the California Court of Appeal affirmed the judgment. App. 1a-21a. The California Supreme Court denied further direct review.

In 1999, respondent filed a petition for writ of habeas corpus in the California Supreme Court. He alleged that his lawyer had rendered ineffective assistance by not presenting, among other things, "readily available expert testimony" regarding the blood spatter and the pool of blood at the crime scene that allegedly would have corroborated respondent's trial testimony. In support of this allegation, respondent presented the declarations of four "experts," who claim that they could have offered evidence (1) to refute the prosecutor's theory that the large pool of blood near the bedroom was made by Johnson and (2) to show that Klein was a possible contributor to the blood spatter sample. The California Supreme Court summarily denied the petition, on the merits, in March 2001. App. 22a.

Federal Habeas Corpus Proceedings

In April 2001, respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California. Again he claimed that his trial counsel had rendered unconstitutionally ineffective assistance in declining to investigate and produce expert opinion evidence on the blood pool and blood spatters. At the district court's suggestion, respondent's trial counsel testified in a deposition. Among other things, respondent's counsel said that, because the State had not conducted any forensic analysis of the blood evidence from the crime scene nor identified any expert witnesses in regard to this evidence as of the start of trial, he intended to exploit this deficiency. Accordingly, respondent's counsel concentrated on defending his client by demonstrating the unreliability of Johnson as a witness and the lackadaisical investigation conducted by the police.

The district court denied the petition. App. 23a-57a. The court explained that respondent's counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." App. at 39a. This determination was reasonable, the district court held, because the prosecution had "not prepar[ed] a blood spatter analysis or even test[ed] any of the blood samples taken from the crime scene." *Id.* Moreover, upon being presented with the serologist's report and being informed that the prosecution intended to use Bell as a blood spatter expert, respondent's counsel objected—but to no avail. Under the circumstances, the district court found, counsel's "actions were reasonable." App. at 40a.

In a published opinion issued in 2008, a three-judge panel of the Ninth Circuit affirmed. See *Richter* v. *Hickman*, 521 F.3d 1222. App. 58a-85a. That panel held that even if respondent's counsel's "failure to consult and present [scientific] experts was unreasonable," respondent was not prejudiced thereby. App. at 66a. Thus, the panel wrote:

> There is no reasonable probability that the jury would have rendered a different verdict had [respondent's] proffered serology experts testified at trial. The serology experts' testimony, even if believed, would not significantly weaken the State's case. All the testimony says is that it is *possible* that the blood sample taken from the bedroom doorway might be a mixture of Klein and Johnson's blood, instead of being exclusively Johnson's blood. Because these expert reports do not foreclose the likelihood that the blood from the blood sample came exclusively from Johnson, they do not impeach Johnson's testimony that the blood came from him alone. The expert reports also do nothing to contradict the weight of the evidence presented at trial that supported the State's theory of the case.

App. at 70a.

The panel also found unpersuasive the declaration of respondent's pathologist. Thus, the panel held: "The reasons the expert provided in reaching his conclusion [i.e., that Johnson could not have made the blood pool because he had not bled enough while he awaited the arrival of the police] are flawed and are partially contradicted by the record." App. at 71a.

On August 10, 2009, however, a limited *en banc* panel granted respondent habeas corpus relief from the state criminal judgment. App. 86a-196a. Judge

Reinhardt, writing for a 7-to-4 majority, began his opinion by quoting Sun Tzu about the need to be prepared for "any contingency." Then, asserting that the source of the blood in the hallway by the bedroom door was "the single most critical issue in the case, at least from the standpoint of the defense," App. at 103a, the majority opinion faulted respondent's counsel for not consulting forensic experts at three stages: before choosing a defense, while preparing a defense, and in the middle of trial when the prosecution suddenly produced two expert witnesses. According to the majority, counsel should have anticipated the prosecution calling a blood spatter expert. App. at 103a-107a. Although acknowledging that counsel reasonably had decided *not* to have any of the blood tested before trial because it would have risked harm to the defense, App. at 109a-110a (n. 9), the majority nonetheless stated there was "no negative consequence" to consulting a serology expert before trial. *Id.* The majority further opined that cross examination will rarely serve as an adequate substitute for affirmative defense testimony. Ultimately, the en banc majority concluded that, while the decision not to call a serology expert alone was not prejudicial, respondent was prejudiced by the failure to call a blood spatter specialist. After explaining over 35 pages of the printed opinion why it believed counsel had rendered ineffective assistance, the majority in a bare one-sentence statement asserted that the California Supreme Court's adjudication of respondent's ineffective-counsel claim had been "objectively unreasonable" so as to permit federal relief under § 2254(d). App. at 135a-136a.

In an exhaustive dissent for four judges, Judge Bybee concluded that defense counsel had acted reasonably and that the state court's decision had been objectively reasonable. In the dissent's view, the en banc majority had not taken *Strickland*[3] and

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[3] *Strickland* v. *Washington*, 466 U.S. 668 (1984).

AEDPA[4] "to heart". Judge Bybee criticized the en banc majority for creating a novel rule that required defense counsel to seek expert advice on every potential evidentiary issue. Viewing the case from the perspective of counsel at the time, Judge Bybee noted that the available evidence of respondent's guilt had made it highly unlikely that forensic investigation would produce helpful evidence. Nor was there any showing that the "modest" difference between cross examination and expert testimony would have made a difference in this case. Finally, counsel's decision to refrain from producing expert testimony such as that proffered in the federal proceedings—about hypothetical possibilities that did not actually eliminate Johnson as the source of the blood in the hallway—did not undermine confidence in the verdict in light of the strong evidence of respondent's guilt.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S HABEAS CORPUS DECISION CONFLICTS WITH *STRICKLAND* V. *WASHINGTON* AND *KNOWLES* V. *MIRZAYANCE* IN ERRONEOUSLY EXPANDING THE SCOPE OF THE SIXTH AMENDMENT TO REQUIRE DEFENSE COUNSEL TO PRODUCE EXPERT-OPINION TESTIMONY RATHER THAN CHOOSING A DIFFERENT TACTIC TO CHALLENGE THE PROSECUTION'S CASE

Two clear rules govern the proper resolution of this case, and the Ninth Circuit violated both of them.

First, the Sixth Amendment standard laid down in *Strickland* v. *Washington* for determining whether counsel has rendered ineffective assistance is a broadly general and deferential one recognizing that there are many ways reasonably competent counsel might choose to defend any particular case and that counsel need not advance all non-frivolous lines of defense even if there is "nothing to lose" by doing so. *Knowles* v. *Mirzayance*, 556 U.S. ___, 129 S.Ct. 1411, 1422, 173 L.Ed.2d 251 (2009); *Jones* v. *Barnes*, 463 U.S. 745, 752-54 (1983); *Strickland*, 466 U.S. at 688-89. Second, under 28 U.S.C. § 2254(d) as amended in AEDPA, the federal habeas corpus court may review state criminal judgments only against the standard of federal constitutional law as "clearly established" in the holdings of this Court's decisions, and may not extend or embellish those holdings as a basis for granting relief. *Mirzayance*, 129 S.Ct. at 1413; *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006); *see Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

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[4] Hereafter "AEDPA" refers to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

In resolving respondent's ineffective-counsel claim in this habeas corpus case, the Ninth Circuit should have denied relief under a "doubly deferential" review of the State court's adjudication under the broad *Strickland* test. Instead, the Ninth Circuit invoked a spurious extension of *Strickland's* Sixth Amendment rule that now would require counsel to produce expert-opinion evidence—as opposed to, as counsel did here, challenging the State's case through cross-examination—whenever it might appear potentially helpful to the defense and "no negative consequences" might appear to flow from it.[5] App. at 109a-116a In doing so, the Ninth Circuit not only erroneously interpreted the Sixth Amendment standard, but did so to upset a state conviction retroactively in violation of § 2254(d).

When the Ninth Circuit committed precisely these same errors in the recent cases of *Knowles* v.

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[5] In this respect, the Ninth Circuit has reiterated its view that investigating and/or presenting expert testimony is an essential element of effective representation under *Strickland* and that the failure to do so is unreasonable even where it might be harmful to the defense. *Belmontes v. Ayers*, 529 F.3d 834, 856-863 (9th Cir. 2008), cert. pending, *Wong* v. *Belmontes* (No. 08-1263).

Mirzayance and *Carey* v. *Musladin*, this Court was constrained to intervene. It should do so again in this case.

A. The Ninth Circuit's Decision Conflicts with *Strickland* and *Knowles.*

1. In *Knowles* v. *Mirzayance*, 129 S.Ct. at 1419-20, this Court confirmed that, under 28 U.S.C. § 2254(d), federal habeas relief may be granted on an ineffective-counsel claim *only if* the state-court decision unreasonably applied the general standard established by *Strickland* v. *Washington*, 466 U.S. 668. Accordingly, it cannot be "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. *Mirzayance*, 129 S.Ct. at 1419; *Wright v. Van Patten*, 552 U.S. 120, ___, 128 S.Ct. 743, 169 L.Ed.2d 583, 586-587 (2008) (*per curiam*); *Schriro* v. *Landrigan*, 550 U.S. 465, 478 (2007); *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006).

Further, as this Court has explained, a "doubly deferential judicial review" standard applies to a *Strickland* claim [6] evaluated under § 2254(d). *Mirzayance*, 129 S.Ct. at 1410; *see Yarborough* v. *Gentry*, 540 U.S. 1, 5-6 (2003) (*per curiam*). And, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 129 S.Ct. at 1420 ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").

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[6] In *Strickland*, this Court held that a defendant must show both deficient performance and prejudice in order to prove that he received ineffective assistance of counsel. 466 U.S., at 687. "The proper measure of attorney performance [is] simply reasonableness under prevailing professional norms." *Id.*, at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. Expounding on the proper assessment of attorney competency in *Yarborough v Gentry*, this Court observed that "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." 540 U.S. at 8.

2. This case presents the question of counsel's duty to investigate as articulated by this Court in *Strickland* v. *Washington* and subsequent cases. In *Strickland*, this Court explained: "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S., at 691. This Court has reiterated that standard in cases involving capital-case sentencing investigations: "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing . . . ." *Wiggins* v. *Smith*, 539 U.S. 534 (2003).

In another capital case, *Rompilla* v. *Beard*, 545 U.S. 374 (2005), this Court elaborated on defense counsel's duty when investigating the prosecution's case in aggravation. This Court found Rompilla's counsel ineffective because they were on notice of the aggravating evidence the prosecution intended to present, but failed to investigate that easily accessible evidence.

Rompilla's analysis, however, arguably applies to counsel's investigation of a prosecution's guilt case as well. Echoing *Strickland*, this Court explained that "[a] standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules." *Rompilla*, 545 U.S. at 381. Defense lawyers are not deficient when they carefully exercise their judgment "about how best to marshal their time and serve their client." *Id.* at 395 (O'Connor, J. conc.).

This Court acknowledged that defense attorneys are not obligated to "scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Id.* at 383. Defense counsel need not go "looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." *Id.* at 389. An assessment of counsel's performance includes considering whether the attorneys spent their time pursuing "other crucial leads," whether pursuit of other leads would be an unnecessary diversion from "more promising" tasks, and whether the prosecution's announcement of additional evidence occurred at the "11th hour." *Id.* at 395. (O'Connor, J. conc.)

In a related context, this Court has recognized that the defense attorney's reasonable assessment of the relative strengths and weaknesses of his client's case may influence tactical decisions. For instance, evidence of a client's guilt understandably will influence the defense—including, in a capital case, whether to actively challenge the guilt phase at all. *Florida* v. *Nixon*, 543 U.S. 175 (2004).

Thus, this Court repeatedly has explained that defense counsel need not exhaustively investigate every avenue of defense. Rather, counsel must use reasonable professional judgment in deciding which lead to pursue and which lines of attack will be a waste of investigative time. The dissent astutely notes that the court of appeals' "decision will force counsel to seek expert advice at every stage of the proceedings, even when counsel believes that it will detract from the other issues counsel must confront." App. at 139a. Nothing in this Court's Sixth Amendment jurisprudence even hints at such an expansive obligation on the part of defense counsel in the routine case.

3. But here—much like in *Mirzayance*—the Ninth Circuit created and applied its own, different standard for attorney competence. Relying on Sun Tzu's philosophy of war, rather than on this Court's precedents recognizing that there are countless ways for a lawyer to render competent assistance in a

given case, the Ninth Circuit in effect laid down a per se rule requiring counsel to investigate and to produce expert-opinion testimony. This eccentric Circuit rule applies regardless of whether counsel could reasonably conclude that such investigation would not be promising or would simply produce equivocal results. App. at 110a-120a.

Thus, citing Circuit law, rather than the law as clearly established by this Court's precedents as required by § 2254(d), Judge Reinhardt's majority opinion invoked a "rule" that "counsel *must . . . present* to the jury *any evidence* he finds that tends to show his client's innocence, tends to undermine the prosecution's case, or raises a reasonable doubt as to his client's guilt." App. at 110a. It cannot be enough, in the *en banc* majority's idiosyncratic opinion, for counsel to rely on cross-examination—"beyond any doubt the greatest legal engine ever invented for the discovery of truth," 5 J. WIGMORE, EVIDENCE 32 [§ 1367] (J. Chadbourn rev. 1974)—to make the defense's point. Instead, even while constrained to recognize that cross-examination of the State's witnesses may establish reasonable doubt, the court below imposed its own rule that "[l]eaving the jurors to believe or disbelieve defendants solely on the basis of their own testimony, without supporting evidence, where such evidence could be obtained with diligent investigation, is objectively unreasonable." *Id.*, at 114a. In essence, defense counsel may not reasonably rely on cross examination, if "affirmative" defense evidence may be produced. Indeed, in the Ninth Circuit's peculiar view—but not in any view expressed by this Court—defense counsel bears special *Strickland* obligations with respect to forensic-expert testimony. *Id.*, at 111a ("The obligation to investigate only grows more imperative where the evidence at issue is the 'only forensic evidence' that could reasonably support the defense theory.").

The court of appeals thus improperly enlarged counsel's duty to investigate to include consultation with and presentation of an expert in virtually every case in which the prosecution could conceivably offer relevant forensic evidence. While Sun Tzu's exhortation to be prepared for any contingency and the Boy Scouts' motto, "Always Be Prepared," might express laudable goals, the demands of a criminal trial force counsel to marshal his or her resources in order to best respond to the evidence the prosecution has signaled it intends to present to prove the charges—not evidence the prosecution *might* present *if* it happens to develop at some point in time. This Court has never held, and thus the federal habeas court under § 2254(d) may not on its own establish, that defense counsel *must conduct* any particular kind of investigation in order to render effective assistance or that the failure to conduct an adequate investigation *simpliciter* is prejudicial.

4. As purported justification for its novel expert-opinion corollary to the *Strickland* rule, the Ninth Circuit explained that counsel was required to investigate and consult with experts because there was "no negative consequence" in doing so. App at 109a-110a. This is inconsistent with this Court's teaching that counsel is not required to search for "needles in haystacks" if counsel reasonably believes there is no "needle" or to "scour the globe" on the "off chance" something will turn up. *Rompilla*, 545 U.S. at 383, 395. The Ninth Circuit's "no negative consequence" notion is but the same "nothing to lose" twist on the *Strickland* rule that the Ninth Circuit invented in *Mirzayance*—and that this Court in *Mirzayance* repudiated.[7]

5. It is true that, in Judge Reinhardt's written opinion, the Ninth Circuit disclaimed adoption of any per se rule about presenting available forensic or expert evidence. App. at 116a (n. 12). The Ninth

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[7] Ironically, the en banc majority's attempt to distinguish *Mirzayance* merely exposes the conflict. The en banc majority described *Mirzayance* as a case in which counsel reasonably investigated and decided not to pursue a hopeless defense. App. at 116a. However, in this case, respondent's counsel also reasonably decided not to pursue an investigation that presented little prospect of a favorable result.

Circuit similarly disclaimed adopting a "nothing to lose" rule in *Mirzayance*. But this Court correctly discerned that, in substance, the Ninth Circuit had done precisely that. It is the same here. As graphically illustrated by its immediate appeal to Sun Tzu, rather than to *Strickland,* the en banc court's majority opinion apparently applied, in the guise of "clearly established Federal law," a novel rule requiring investigation of "any" conceivable line of defense despite counsel's reasonable professional judgment as to the necessity for such investigation as long as there was "no negative consequence" to the defense and regardless of whether it deprived counsel of time to check out more promising leads. The Ninth Circuit spawned a "hard edged rule" without looking at the case as if standing in counsel's shoes. Cf. *Rompilla*, 545 U.S. at 341.

B. The Ninth Circuit's Interpretation of the Right to Effective Counsel is Untenable

1. As Judge Bybee's dissent correctly discerned, the new hard-edged "any contingency" rule of Sun Tzu, as adopted by the Ninth Circuit, is exposed as untenable when applied to one standing in the shoes of respondent's counsel. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions . . . And, when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland,* 466 U.S. at 691. Here, counsel had good reason to believe that respondent was a murderer and a liar. Respondent tried to destroy the firearms evidence. He made inconsistent statements and lied to the police in claiming that his truck was not at the murder scene. Rather than protesting respondent's innocence, his own girlfirend informed the police that she did not think she should reveal what respondent had told her (inferably because it would not be helpful). And, in a

recorded conversation with Branscombe, respondent said he told the police he had not killed anyone, and "da, da, da," to which Branscombe replied that he thought "we were going to tell the truth." Even respondent admitted that this exchange implicated him in the crime. (Respondent's counsel successfully prevented the admission of this post-arrest conversation at trial and, of course, respondent lied on the stand when he denied making the statements.)

Respondent's apparent consciousness of his own guilt, and his damaging adoptive admissions, were not the only problems confronting respondent's counsel. Extensive circumstantial evidence tied respondent to the crime and proved that the shootings occurred in the commission of a robbery and not as the result of a spontaneous gunfight. Klein was shot with both a .32- and a .22-caliber bullet; an expended .32-caliber shell casing was found a few feet from the couch where Klein was lying; a .22-caliber shell casing was on a pillow next to the couch; and the identical brand of .22-caliber bullets were found in respondent's garage near the gun safe that Johnson said respondent and Branscombe had stolen. Respondent's fingerprints were on the safe. Further, Johnson's backpack was found in respondent's garage. Finally, Johnson's pager, which had been in his missing hip sack on his nightstand, was found by the police on the front lawn. This evidence alone persuasively supported the prosecution's theory that Klein was shot on the couch with two separate firearms, both of which were directly traceable to respondent and Branscombe.

Based on the information available to him, defense counsel reasonably could conclude that forensic investigation into the blood evidence (i.e., the sample from the spatter on the bedroom wall and the pool in the doorway) would be fruitless. Indeed, the en banc majority conceded that, because of the risk it would incriminate respondent, counsel acted reasonably in refraining from testing any available blood ahead of time. App. at 109a-110a (n. 9). The Ninth Circuit nevertheless held that counsel should have consulted a serology expert for "no negative consequences" would have ensued from doing so. The *en banc* court's holding on this latter point is internally inconsistent with its concession that counsel was not obliged to conduct pretrial blood testing. More broadly, as noted above, the "no negative consequences" justification is merely a rephrasing of the "nothing to lose" rule that the Ninth Circuit adopted—and that this Court rejected—in *Mirzayance.*

2. Moreover, contrary to the import of the en banc opinion, counsel was faced with much more blood-related evidence than just the pool of blood in Johnson's doorway. This other blood evidence supported the conclusion that Klein had been shot on the couch, not in the doorway. And it undermined any speculation, such as that put forward by respondent's habeas corpus experts, that the pool of blood near the bedroom door might not have been Johnson's. For example, there was blood spatter on the arm rest and a concentration of blood near the dying Klein's head on the end of the couch. And there was high-velocity blood spatter on the wall behind the couch. Further, bloodstains on Klein's face indicated he had not been moved from that spot. Finally, Detective Bell's testimony that there was nothing to suggest that Klein had been moved from the doorway to the couch has never been challenged by respondent's experts. Conversely, Johnson himself had blood on his cheeks, covering his shirt, hands and right shoulder. Indeed, while talking to the police, he left a significant pool of blood in his kitchen.

Finally, the prosecution had gathered minimal evidence about the blood at the scene of the crime. And it had not indicated it would be calling witnesses about the blood. The en banc majority has greatly exaggerated the importance of the bedroom blood pool and given it a prominence it does not deserve. Certainly, respondent's counsel reasonably could have concluded that investigation of the blood evidence would be neither relevant nor helpful to the defense case. *See District Attorney's Office for Third*

Judicial District v. *Osborne*, ___ U.S. ____, 129 S.Ct. 2308 , 2329-2330 (2009) (Alito, J. *concurring*). As this Court has recently reiterated, "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." ***Bobby*** v. ***Van Hook***, ___ U.S. ____ (No. 09–144; decided Nov. 9, 2009), slip opn. at p. 5 (quoting ***Roe*** v. ***Flores-Ortega***, 528 U. S. 470, 479 (2000)).

3. The evidence later offered by respondent in his federal habeas corpus case only vindicates his counsel's decision. The blood on the wall near the pool of blood by the bedroom indisputably included Johnson's blood. As the dissent and panel opinion both recognized, this new evidence does not undermine the prosecution's case that Klein was shot on the couch. App. at 69a-72a, 159a-175a. Nor does it explain the high velocity spray of blood near the couch.

Respondent's "expert" opinion testimony on blood spatter, speculating that Johnson could not have been the source of the pool of blood, does not contradict the strong evidence that Klein was shot on the couch. That "expert" opinion, moreover, is based on the unsupported premise that Johnson must have been standing up at the time. in the hallway doorway. Nor can it account for the fact that Johnson indeed was bleeding sufficiently to leave a pool of blood, as he did in the kitchen while talking to the police. Finally, it can hardly explain how—let alone why— Johnson might have moved Klein's body from the hallway to the couch without smearing the pool.

C. Under Proper "Doubly Deferential" Review, The State Court's Rejection of Respondent's Ineffective-Counsel Claim Proves "Objectively Reasonable" On Both the "Performance" and the "Prejudice" Prongs of the General *Strickland* Test, So Habeas Corpus Relief "May Not Be Granted."

Interpreting the Sixth Amendment as imposing on counsel a specially enlarged and unrealistic duty to investigate expert opinion was the Ninth Circuit's first mistake. Its second was to apply that interpretation, rather than this Court's clearly-established *Strickland* rule itself, to retroactively grant habeas corpus relief from a state conviction despite the restriction on federal review imposed by 28 U.S.C. § 2254(d).

Under the proper "doubly deferential" review required by the combination of *Strickland* and § 2254(d), the California Supreme Court's rejection of respondent's ineffective-counsel claim easily passes muster as "objectively reasonable." For the state-court record provided a reasonable basis for rejecting the ineffective counsel claim on either "competent performance" grounds or in any event on "no prejudice" grounds.

1. The state-court record provided the state court with a reasonable basis to conclude that counsel's challenged decision to refrain from presenting expert-opinion testimony to counter the prosecution's blood evidence, but to minimize it through cross-examination instead, constituted competent performance. First, counsel knew that the prosecution had neither tested nor preserved samples of the photographed blood in the pool by the door. Second, defense counsel succeeded in wresting from prosecution expert Spriggs her acknowledgment that she could not rule out the possibility that Klein's blood, and not just Johnson's, had been present in the nearby spatter of blood on the wall. Third, counsel

reasonably could have assumed that blood spatter reconstruction was inherently speculative and that emphasizing it might have tied his client's defense to it too closely.

2. Perhaps more simply and directly to the point—as this Court noted in *Strickland* itself, 466 U.S. at 695-96—the state record provided support for the conclusion that counsel's decision did not result in any "reasonable probability" of prejudice. Contrary to the *en banc* court's analysis, the blood evidence was hardly crucial to the defense case. And, as the federal habeas corpus hearings demonstrated, expert-opinion testimony would have proved hopelessly equivocal and unpersuasive—if admissible at all.

The most challenging evidence confronting respondent's trial counsel was the undisputed proof that Klein had been fatally wounded by a .32-caliber bullet to the head and had suffered a neck wound from a .22-caliber slug. In the face of it, respondent's counsel had to explain how Klein came to be shot by two different firearms. More daunting, in doing so, he also had to offer a plausible reason for respondent's and Branscombe's guilty-knowledge disposal of two guns from the scene and for the discovery of loot from the robbery and incriminating bullets in respondent's house. Conversely, the blood evidence that seemed to mesmerize the en banc court faded in significance in the harsh light of respondent's testimonial claim that he was not even in the house when the shootings occurred.

In any event—and largely because *no samples* from the pool of blood were obtained or preserved—none of respondent's proffered *habeas corpus* experts could offer more than mere speculation that Klein's blood might have been in the pool. Similarly, as Judge Bybee's dissenting opinion notes, none of respondent's habeas corpus experts has ever proffered an opinion challenging Detective Bell's testimony in regard to the blood stains on Klein's face or near the couch where he was found by the police. *See* App. at 186a. In addition, it remains simply implausible to conclude that equivocal expert testimony of the sort respondent produced in federal court reasonably might have convinced respondent's jury of the improbable scenario suggested by the en banc opinion: that, for some mysterious reason, the wounded Johnson or an unknown person somehow might have picked up Klein vertically from the blood pool—without leaving any smears or any trail of blood—and deposited him on the couch before the arrival of the police. Indeed, as Judge Bybee notes, it is by no means clear that respondent's proffered blood-spatter "expert" would have been qualified to render any opinion on the subject in state court anyway. App. at 179a-180a.

3. Of course, regardless whether a federal court correctly might or might not have found ineffective counsel on these facts under a proper interpretation of the *Strickland* standard, the determinative issue before the Ninth Circuit in this case was the AEDPA question of whether the state court's rejection of respondent's claim was not merely "wrong" but "objectively unreasonable." Given the wide latitude afforded by "double deference" review of *Strickland* claims under § 2254(d), these facts provide no room for a federal court to condemn the state court's adjudication on such grounds.

The four dissenting judges on the *en banc* court, the three judges on the original panel, and the district judge got it right. In erroneously applying its own novel rule rather than the clearly-established *Strickland* standard, and in thus departing from "doubly-deferential" review under *Strickland* and § 2254(d), the Ninth Circuit got the question of whether the state court's adjudication was at least "reasonable"—"the only question that matters"—wrong. *See Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003). Certiorari review is warranted to ensure both that this Court's *Strickland* standard is followed and that Congress' intent in AEDPA is carried out. (E.g., *Waddington* v. *Sarausad*, 129 S.Ct. 823 (2009); *Hedgpeth* v. *Pulido*, 129 S.Ct. 530 (2008) (*per curiam*); *Mirzayance*, 129 S.Ct. 1411; *Schriro* v. *Landrigan*, 550 U.S. 465; *Carey* v. *Musladin*, 549 U.S. 70; *Rice* v. *Collins*, 546 U.S. 333 (2006); *Kane* v.

Garcia-Espitia, 546 U.S. 9 (2005) (*per curiam*); *Brown* v. *Payton*, 544 U.S. 133 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652; *Middleton* v. *McNeil*, 541 U.S. 433 (2004) (*per curiam*); *Yarborough* v. *Gentry*, 540 U.S. 1 *(per curiam)*; *Lockyer* v. *Andrade*,, 538 U.S. 63; *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (*per curiam*); *Early* v. *Packer*, 537 U.S. 4 (2002) (*per curiam*). As Judge Bybee aptly observes, the breadth of the rule announced by the Ninth Circuit in this case threatens to open up the floodgates to litigation regarding the lack of expert assistance at trial. App. at 172a (n. 13).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 9, 2009

Respectfully submitted,

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APPENDIX

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No. ______

In the Supreme Court of the United States

KELLY HARRINGTON, WARDEN, *Petitioner*,

v.

JOSHUA RICHTER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed 3/20/98

CERTIFIED FOR PARTIAL PUBLICATION*
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent v. CHRISTIAN BRANSCOMBE et al., Defendants and Appellants.	C023375 (Super. Ct. No. 94F10607)

APPEAL from a judgment of the Superior Court of Sacramento County. James T. Ford, Judge. Affirmed.

Janice M. Lagerlof and Patricia L. Watkins, under appointments by the Court of Appeal, for Defendants and Appellants.

Daniel E. Lungren, Attorney General, George Williamson,Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Shirley A. Nelson and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Christian Branscombe and Joshua Richter of murder, attempted murder and related charges. We shall affirm. In the published part we hold that the People may introduce rebuttal evidence consisting of statements taken by peace officers in deliberate violation of the rules announced in *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] *(Miranda)*, an issue pending in the California Supreme Court. *(People* v. *Peevy*, review granted January 22, 1997 (S056734), cause argued March 3, 1998.)

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I, part II(A)(1)(b), III and IV.

I.

The facts at trial established that early on the morning of December 20, 1994, defendants attacked the home of a friend, a drug dealer, Joshua Johnson. Johnson's home was used as a "party pad." Defendants shot Johnson and Patrick Klein; Klein died. They then stole Johnson's safe and about $6,000 in cash – the proceeds from his daily drug sales.

Johnson saw Branscombe shoot him but did not see Richter shooting. However, Klein was hit by two bullets, a .32 caliber and a .22 caliber. Branscombe had had a .32 caliber earlier that evening. Johnson's safe was found at Richtet's house where Johnson occasionally kept it.

Richter's attorney turned over to the police a .380 pistol which presumably was Johnson's, though as the People point out there was no testimony it was Johnson's. Johnson had kept the pistol by his bed, but found it was missing after the shooting. There was expert testimony that Klein was shot while lying on a couch and Johnson was shot while in bed.

Johnson habitually bragged about his money and guns. Richter had a motive in that he owed Johnson money from the sale of hallucinogenic mushrooms.

Richter's girlfriend testified he woke her up early in the morning. "He was really upset, and he was saying 'Something terrible had happened.

[Johnson] went crazy. There was a shooting.'" Richter's former girlfriend testified she had seen Johnson's safe at Richter's house shortly before the shooting and thereby cast doubt on Johnsons's testimony that he had removed it from Richter's house.

Richter testified he simply drove Branscombe to the house; he saw Klein let Branscombe in; he heard gunshots, an argument and more shots. Richter ran into the house and turned on a light. Branscombe told Richter they tried to kill him, so he (Branscombe) picked up Johnson's .380 and left. Richter denied owning a handgun. He testified Johnson had been robbed and threatened before, suggesting that Johnson, was trigger-happy or mistook his friends for enemies. When Richter was interrogated he knew the gun used was a .32.

Johnsons's credibility was tarnished by evidence he sold drugs after the shooting and was arrested on other charges, but refused to leave Oregon until he was granted immunity. His character was further revealed by evidence that after the shooting he tried to call his girlfriend, then took the time to hide some marijuana plants.

The defense disclosed to the People the presence of two bullet holes in the wall and floor of the house, to bolster the claim that there was a gun battle, or that Johnson, crazed with drugs and armed with a variety of weapons, did all the shooting. Johnson gave inconsistent versions of the shooting; for example, he said he heard four voices, and that his .380 was in the gun safe, not by his bed.

The jury convicted defendants on all counts.

II.

Each defendant claims ineffective assistance of trial counsel. Each must show his trial attorney's conduct wasdeficient and such deficiency caused prejudice. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-696 [80 L.Ed.2d 674, 693-*699] i People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-218.)

A.

Richter faults his trial counsel's conduct in several respects. He has not established prejudicial error.

1. Richter's attorney did not move to suppress statements Richter made to the police. At the time of his arrest, Richter was in the process of telephoning his attorney. A detective knew that and did not give Richter the advisements compelled by *Miranda*. Although Richter invoked his right to an attorney in the discussion, the detective continued to question him to obtain "impeachment" evidence, because it was his understanding that as long as a statement was not coerced, it could be useful in court.

On appeal Richter contends: "Because of counsel's failure, [the detective] was permitted to testify that appellant told [him] that his truck was not at the scene and that if the facts were as [the officer] represented them, then [Richter] was being set up." Richter asserts that an intentional *Miranda* violation constitutes a violation of the Fifth Amendment, the statements could not have been admitted for impeachment purposes, and, hence, his trial attorney did not provide effective counsel. Here, the real sting of the evidence was not to prove Richter lied about the truck on the stand, but that he lied to the detective and, hence, was conscious of his guilt, but Richter raises no issue about this distinction in this portion of his brief: He presents the case as raising a clear issue about the legality of admission of statements obtained in deliberate violation of *Miranda* and we accept the argument on those terms. We reject the claim.

a. There are cases supporting Richter's major premise, that "intentional" *Miranda* violations taint a statement, such that it cannot even be used for impeachment. (E.g., *People* v. *Bey* (1993) 21 Cal.App.4th 1623, 1628.) To the extent those cases hold that every statement elicited by an interrogator who intentionally violates the *Miranda* guidelines is necessarily a "coerced" statement, those cases were wrongly decided.

The Fifth Amendment to the United States Constitution provides in part, "No person. . shall be compelled in any criminal case to be a witness against himself[.]" Article I, § 15 of our state Constitution similarly provides that" [p]ersons may not . be compelled in a criminal cause to be a witness against themselves[.]" This "privilege" against self-incrimination has been extended to proscribe the admission in court of out-of-court statements as well as the direct compulsion of testimony.

An involuntary or coerced statement cannot be used against an accused in a criminal proceeding for any purpose. *(Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 225 [36 L.Ed.2d 854, 861]; *People* v. *Haydel* (1974) 12 Cal.3d 190, 197.) Such admissions, in addition to being excluded by the explicit language of constitutional provisions cited above, are unreliable *(People* v. *Garner* (1961) 57 Cal.2d 135, 163), and "if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *(Culombe* v. *Connecticut* (1961) 367 U.S. 568, 602 [6 L. Ed. 2 d 1037, 1057 -1058].)

"Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system -- a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. [Citations.] To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees." *(Rogers* v. *Richmond* (1961) 365 U.S. 534, 540-541 [5 L.Ed.2d 760, 766-767].)

A statement is obtained involuntarily from a defendant when "the accused's abilities to reason or comprehend or resist were in fact so disabled that he was incapable of free or rational choice." *(In* re *Cameron* (1968) 68 Cal.2d 487,498; see *Townsend* v. *Sain* (1963) 372 U.S. 293, 307 [9 L.Ed.2d 770, 782] ["or if his confession was not 'the product of a rational intellect and a free will,' his confession is inadmissible because coerced."].) coercion is determined by considering the "totality of the circumstances." *(In* re *Cameron, supra,* 68 Cal.2d at p. 498; see *People* v. *Benson* (1990) 52 Cal.3d 754, 779; *Culombe* v. *Connecticut, supra,* 367 U.S. at p. 606 [6 L.Ed.2d at p. 1060].)

In *Miranda,* the United States Supreme Court imposed a set of prophylactic guidelines as follows. A suspect who is subject to custodial interrogation, "must first be informed in clear and unequivocal terms that he has the right to remain silent . accompanied by the explanation that anything said can and will be used against the individual in court . [and the suspect] must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *(Id.* at pp. 467-471 [16 L.Ed.2d at pp. 720-722].) "[T]he prosecution may not use statements . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *(Id.* at p. 444 [16 L.Ed.2d at p. 706].)

In *Harris* v. *New York* (1971) 401 U.S. 222 [28 L.Ed.2d 1] *(Harris),* the court held that statements elicited in violation of the *Miranda* requirements could be used for impeachment. "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies the legal standards." *(Id.* at p. 224 [28 L.Ed.2d at p. 4].)

Harris held that "*Miranda* barred the prosecution from making its case" with defendant's statements. However, as long as those statements are not coerced, the "petitioner's credibility [could] appropriately [be] impeached by use of his earlier conflicting statements." *(Id.* at pp. 224-226 [28 L.Ed.2d at pp. 4-5].) "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *(Id.* at p. 226 [28 L.Ed.2d at p. 5].) Even though there is concern that this holding will encourage intentional *Miranda* violations (see *People* v. *May* (1988) 44 Cal.3d 309, 333 (dis. opn. of Mosk, J.) *(May)),* the greater worry lies in preventing perjury in our courtrooms.

Three years after *Harris, supra,* 401 U.S. 222 [28 L.Ed.2d 1] the California Supreme Court held as a matter of independent state law that statements obtained in violation of *Miranda* could not be used for impeachment. *(People* v. *Disbrow* (1976) 16 Cal.3d 8 101, 113.) The court felt a "responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court" on similar issues. *(Id.* at p. 115.) The subsequent adoption of Proposition 8 (Cal.Const., art. I, § 28, subd. (d)) in 1982, effectively overruled *Disbrow* . *(May, supra,* 44 Cal.3d 309.) The *May* court "[c]onclud[ed] that section 28(d) abrogated the *Disbrow* rule and thereby left *Harris* v. *New York* (1971) 401 U.S. 222 [28 L.Ed.2d 1, 91 S.Ct. 643] to govern the case[.]" *(May, supra,* at p. 314, extending the rationale of *In* re *Lance W.* (1985) 37 Cal.3d 873.)

The first California case after *May* involving intentional police violation of the *Miranda* rules was *People* v. *Baker* (1990) 220 Cal.App.3d 574 *(Baker).*

The police officers in *Baker* testified that they "purposefully continued their questioning of Baker after he invoked his *Miranda* rights for the express purpose of obtaining statements to be used against him should he elect to testify at trial." *(Id.* at p. 576.) The court explained that "[i]n balancing the societal interest to be served by preventing police misconduct against the perceived detriment of allowing defendants to commit perjury, the *Harris* and *May* courts have decided against the latter and in favor of the former." *(Id.* at p. 579.) Therefore, the statements were admissible to impeach.

However, two recent cases suggest that an "intentional" *Miranda* violation, without more, establishes coercion. In *People* v. *Bey, supra,* 21 Cal.App.4th 1623 *(Bey),* an officer deliberately continued questioning a suspect after he refused to waive his right to remain silent. The officer also misled the suspect into believing that his statements could not be used against him. "'I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court. '" *(Id.* at p. 1627.) Thus, *Bey* did not involve a simple violation of *Miranda.* This "present[s] a deliberate police violation of *Miranda* *coupled with a misrepresentation to appellant about the legal consequences of that violation." (Id.* at p. 1628, italics added.) The court appears to iterate that *any* intentional violation of *Miranda* would constitute an "illegal police coercion." *(Ibid.)* This, however, is not the standard set forth by the Supreme Court. To determine coercion, the court must look at the totality of the circumstances. *(In re Cameron, supra,* 68 Cal.2d 487, 498.) To the extent *Bey* suggests a per se rule that a deliberate disregard of a suspect's invocation of *Miranda* rights necessarily establishes coercion, *Bey* is wrongly decided.

In re *Gilbert* E. (1995) 32 Cal.App.4th 1598 *(Gilbert E.),* which quotes *Bey,* is distinguishable because the trial court in *Gilbert* E. allowed the statements to be entered into the prosecution's case-in-chief. Statements obtained through a violation of *Miranda* are inadmissible in the prosecution's case-in-chief. This rule was established in *Miranda* and was not affected by *Harris.* To the extent defendant relies on *Gilbert E.*, such reliance is unavailing.

To the degree that *Bey* and *Gilbert E.* can be read to impose a per se test of coercion, we disagree. The intentional violation of a suspect's *Miranda* rights does not constitute a per se coerced confession making such statements inadmissible. Statements obtained through an interrogation conducted in violation of *Miranda* are admissible to impeach a defendant's inconsistent testimony, if they are voluntary. As the Supreme Court stated in *Harris,* "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *(Harris, supra,* 401 U.S. at p. 225 [28 L.Ed.2d at p. 4].) As stated above, a finding of involuntariness must be based on the totality of the circumstances. *(Schneckloth* v. *Bustamonte, supra,* 412 U.S. at p. 227 [36 L.Ed.2d at p. 863]; *In* re *Cameron, supra,* 68 Cal.2d at p. 498.)

One further case merits discussion. In *Cooper* v. *Dupnik* (9th Cir. 1991) 963 F.2d 1220 *(Cooper),* the police had "planned meticulously for the day they would arrest their first suspect" in a notorious rape case. *(Id.* at pp. 1223-1224.) Their plan was to ignore a suspect's constitutional rights, deny him contact with counselor friends and interrogate him until he confessed. *(Id.* at p. 1224.) This, like *Bey,* was more than a simple *Miranda* violation. As pointed out in Judge Wiggins's concurrence, "[i]n the present case, the police conduct went far beyond an ordinary *Miranda* rights advisement violation." *(Cooper, supra,* 963 F.2d at p. 1252 (conc. opn. of Wiggins, J.).) Judge Brunetti's dissent points out that" [w]hat really offends the majority and seems to support its conclusion of a substantive due process violation is the fact that the officers interrogated Cooper in knowing violation of his *Miranda* rights. This is not enough to establish a violation of substantive due process rights." *(Id.* at p. 1256 (dis. opn. of Brunetti, J.).) We agree with Judge Brunetti and, of course, are not bound by the decisions of the United States Ninth Circuit Court of Appeals. (See *In* re *Tyrell J.* (1994) 8 Cal.4th 68, 79 ["decisions of the lower federal courts are persuasive but not controlling"].)

Statements obtained through intentional violation of the *Miranda* rules may be used for impeachment purposes when, based on the totality of the circumstances, they are voluntarily made. Police officers are presented with a choice they may cease questioning upon defendant's invocation of the right to remain silent or they may continue their discussion with the suspect and therefore lose the benefit of that evidence in the prosecution's case-in-chief.

b. Even if we agreed that the evidence was not admissible and counsel should have made the motion to suppress, the erroneous admission into evidence of a statement taken in violation of the *Miranda* rules is subject to harmless error analysis. *(People* v. *Sims* (1993) 5 Cal.4th 405, 447 [test is whether error is harmless beyond a reasonable doubt].)

Assuming Richter's statement necessarily would have been excluded upon proper motion, the error was harmless.

2. Richter argues his trial counsel should have objected to part of the prosecutor's argument.

The prosecutor pointed out inconsistencies in Richter's story, focusing on the location of Johnson's safe and pointing out that Johnson had no car, but Richter had a truck, thus Richter could move the safe. He then said, "It's reasonable to tell the cops I was there. My truck was there, but it's self-defense. It's unreasonable to say my truck wasn't there. It doesn't run right." (There was testimony Richter's truck was hard to start.)

On appeal Richter claims this "invited the jury to consider appellant's statement as showing consciousness of guilt." Assuming this is true, it is difficult to see how an objection and request for admonition would have changed anything, and Richter makes no effort to articulate the prejudice he asserts flowed from this alleged mistake by trial counsel.

3. In an opaque argument, Richter accuses the prosecutor of committing misconduct "by asking appellant about a statement of his non-testifying codefendant which implicated appellant." Richter admits trial counsel "may have made and argued an oral motion" to redact Branscombe's statements, and "the court granted coappellant Branscombe's motions

'with respect to Bruton error' and referred to editing requirements." He continues: "While the record is less than a masterpiece of clarity regarding what motions were made, the law of the subject is crystal clear."

But "law" does not exist in a vacuum. The applicable law depends on the facts before the court. Since Richter confesses the record is unclear, and counsel "may have" taken the appropriate steps, he has failed in his burden to demonstrate error. In any event, to the extent we can decipher the particulars of Richter's complaint, it is that the prosecutor should not have asked Richter about a conversation Richter had with Branscombe. The prosecutor asked Richter if Branscombe said, "'Did you tell them anything?' [a]nd you say, 'I just told them that I did not kill anyone,' and da da da? And do you remember him saying, 'Joshua [Richter], we were going to tell the truth. '"

Richter answered that he did not recall such statement. For this reason there was no evidence of any such statement by Branscombe. Therefore, Richter's claim that he was prejudiced by trial counsel's failure to object to the prosecutor's question goes nowhere.

4. Richter contends trial counsel should have objected to evidence that Richter's girlfriend was buying a handgun in December of 1994. The gun was a Sig Sauer model P229. There was testimony that it was both a 9 millimeter and a .357 caliber gun, but the jury was not informed that this was because of interchangeable barrels. Although nobody argued this gun was used in this shooting, because Richter testified he did not own a gun (RT 1096) this evidence was relevant for impeachment. The prosecutor failed to establish that the girlfriend was

a "straw" purchaser and the evidence was left unconnected to any relevant issue.

Assuming objections should have been made, that somehow trial counsel could foresee that the evidence would not be connected up, we fail to see any prejudice. While it is true that in some cases evidence that a defendant possessed deadly weapons may "taint" him in the jury's eyes (e.g., *People* v. *Riser* (1956) 47 Cal.2d 566, 577), here the prosecution failed to connect the gun to Richter; indeed, his girlfriend did not even pick it up from the store until after the shooting. We agree with the Attorney General that any error was not prejudicial.

During a tape-recorded interview at the hospital, Johnson told detectives that Richter "talked about buying a gun recently. A [Sig Sauer] .357, and he said he bought it at a gun shop." Richter again claims such evidence was inadmissible and trial counsel should have objected. We reiterate: Any error was harmless.

5. Richter contends his trial counsel should have moved to strike Johnson's testimony that Richter threatened to kill "Aaron Eddie." During cross-examination of Johnson, trial counsel asked whether or not Richter was a violent person:

"Q. And you were upset with him because you felt that he spent money on other things rather than pay you [for the psilocybin]?

"A. On one occasion we had an argument. I didn't hold a grudge. He came into the house after the argument.

"Q. Did you threaten to do him any physical harm --

"A. No, no way.

"Q. -- over that? [¶] And [Richter] never threatened you, did he?

"A. No.

". . . . .

"Q. You never saw [Richter] get violent at any time, did you?

"A. I heard him make threats on someone's life before, and yeah.

"THE COURT: On your life?

"THE WITNESS: No, on another individual's life. He was planning to murder this kid, Aaron Eddie. He actually told me, 'Don't tell anybody.' [¶] That he was going to wait in front of his house and stab him to death. This was something that he said, and it shocked me because I thought him to be a really peaceful person.

"Q. [Richter's counsel]: And who's this Aaron person?

"A. It's a guy he got in a fight with. Actually he got in a fight with at a party, and he, I guess, was really upset because the guy kicked him a few times or something, and there are many people that he told this to besides me."

Richter contends trial counsel "should never have opened the door to inadmissible character evidence by asking Johnson, a victim of the charged offenses, questions about appellant's character when he was not absolutely certain of the answers. At a minimum, when Johnson's first answer was nonresponsive, he should have moved to have the answer struck and quickly have moved on to a less risky subject."

We agree with the Attorney General that there exists a plausible reason. for counsel's actions: To paint [Johnson] as a liar, a braggart who wanted to be seen as a "tough guy," hence his gun collection which he displayed to visitors, and the fact that he made no secret of his business or the money he carried around in a hip sack -- with his .380 pistol. Probing this alleged threat could confirm Johnson's "hyperbole" as the Attorney General puts it.

Further, Richter concedes this was surprise testimony, but faults trial counsel for continuing to ask questions "when he was not absolutely certain of the answers." Unlike an appellate attorney, who has the luxury of leisurely picking through the carcass of the record, a trial attorney must often act on his feet, with only his experience and instinct to guide him. (See *People* v. *Eckstrom* (1974) 43 Cal.App.3d 996, 1000-1003.) A trial attorney cannot always avoid asking questions to which he does not know the answer. Issues come up in trials without warning and trial attorneys must move forward as best they can. Sometimes their effort backfires, but that does not mean they should not have tried.

6. Richter faults trial counsel for not objecting to the trial court's proposed response to a jury question. He focuses on one portion of the jury's question in isolation, but when viewed in context we find he has not shown prejudice.

The jury asked two questions on one sheet of paper, as follows:

"Clarification of instructions:

"If a defendant is found guilty of Robbery & Burglary in the first degree, it is our understanding that this necessarily leads to a guilty verdict of murder in the first degree if a human being is killed during the commission of the above Robbery and Burglary.

"Also, if a defendant is found to have aided & abetted in the above Robbery/Burglary, is he guilty of all charges (or can you *[sic]* find him guilty of lesser charges) as found for the other defendant."

The trial court, after consulting with counsel, answered "Yes" to the first question and "The 'felony murder rule' applies only to murder, not attempted murder" to the second question. Thus it appears that the parties and trial court thought the jury was having difficulty in assessing Richter's liability for Johnson's wounding, as opposed to Klein's death. Recall that Richter's defense was he entered the home after the shooting, thus raising the possibility the jury would find he knowingly aided in Branscombe's planned robbery, by driving the truck. This is a reasonable construction of the questions.

On appeal Richter faults counsel for not arguing that the court should have told the jury (1) an aider of a robbery or burglary could not be liable for the murder or attempted murder unless those crimes were the "natural and probable consequences" of the robbery or burglary and (2) an aider could be convicted of a lesser offense than the shooter if the charged crimes (murder and attempted murder) were not the natural and probable consequences of the crimes aided.

The authorities relied on by Richter do not deal with the felony-murder rule. He relies on the rule that an aider is not liable for the nontarget offenses of the perpetrator unless those offenses are the natural and probable consequences of the target offense (see *People* v. *Prettyman* (1996) 14 Cal.4th 248, 260-270), and on *People* v. *Woods* (1992) 8 Cal.App.4th 1570, which held that where liability depends on the natural and probable consequences doctrine, "the aider and abettor and the perpetrator may have differing degrees of guilt based on the same conduct depending on which of the perpetrator's criminal acts were reasonably foreseeable under the circumstances and which were not." *Id.* at p. 1587, italics omitted.)

It is possible that the trial court and counsel missed the point of the jury's second question. But the way the jury phrased the question, it was apparently linked to the first question, which focused on the felony-murder rule. The jury asked about the liability of one who aids "in the above Robbery/Burglary," meaning a robbery and burglary during the commission of which "a human being is killed" as the first question made clear. The felony-murder rule renders one who aids a robbery during which a person is killed into a murderer without regard to the "natural and probable consequences" limitation on ordinary aider liability. *(People* v. *Anderson* (1991) 233 Cal.App.3d 1646, 1655, 1658-1659, see *People* v. *Dillon* (1983) 34 Cal.3d 441, 477.) The correct rule to apply as to aider liability for felony murder is that there is liability for *"consequences that are highly probable, conceivably possible,* or *wholly unforeseeable." (Id.* at p. 477, italics added.) In other words, "in for a dime, in for a dollar." Because the phrasing of the jury note indicates it was confused about application of the felony-murder rule, we cannot say that trial counsel *must* or *should* have anticipated the jury was confused about the natural and probable consequences doctrine. The trial court's answer was not incorrect, at worst it did not fully state the rules of aider liability *apart from the felony-murder rule.*

Although appellate counsel's proposed clarifications of the instructions are arguably correct, we cannot fault trial counsel for perceiving that these were the issues upon which the jury was confused, rather than the distinction between felony murder liability for first degree murder and aider liability for attempted murder. Further, nothing in the record shows that the jury remained uncertain about the proper rules to apply. We agree with the Attorney General that the answer was at worst "imprecise." Nowhere does Richter explain how this imprecision was likely to confuse the jury on these facts. He asserts a better answer would have resulted in a better outcome, but he does not explain why this is so. Assuming he has shown error, he has not shown prejudice.

B.

Branscombe's claim is that his trial counsel did virtually nothing and thus he was constructively denied counsel. We disagree. It is true that Branscombe called no witnesses and made no opening statement. It is also true that Richter's opening statement suggested Branscombe would testify, but Branscombe did not testify.

Contrary to Branscombe's portrait of the case on appeal, his trial attorney provided an active defense. He objected to testimony throughout the trial, made several motions, and cross-examined witnesses vigorously. He delivered a closing argument in which he pointed out inconsistencies in the People's case and cast blame on Johnson for being a drug dealer and wielding a dangerous-looking firearm. He discussed the People's burden of proof and the various degrees of homicide. He argued for self-defense.

Nothing on the face of the appellate record supports the claim that Branscombe's counsel did not "test" the People's case. In particular, appellate counsel repeatedly states or implies that trial counsel erred by not having Branscombe testify. But trial counsel could not force Branscombe to take the stand. Branscombe may have simply declined to testify.

Appellate counsel states that trial counsel's "decision to rely on Richter's testimony as the basis for the self defense claim is also troubling," overlooking the obvious: Trial counsel may have searched high and low for any other evidence to support the defense, without success. Failure to find or introduce evidence which does not exist is not incompetence.

Appellate counsel inaccurately asserts that trial counsel "essentially deferred to codefendant's counsel in cross examination and in presenting the defense case[.]" Trial counsel (1) successfully moved to exclude evidence, (2) successfully moved to suppress statements, (3) made numerous objections, (4) cross-examined most of the witnesses, (5) moved successfully to strike testimony, and (6) had a witness perform a demonstration.

It may well be that Richter's and Branscombe's trial counsel cooperated and elected Richter's counsel as the "lead," a common practice which does not, of itself, establish a conflict of interest or that one counsel has abrogated his function.

In short, where, as here, the appellate record discloses no basis for counsel's actions or inactions, the remedy, if any, must be by way of habeas corpus. *(People* v. *Pope* (1979) 23 Cal.3d 412, 426, cf. *People* v. *Diggs* (1986) 177 Cal.App.3d 958.)

III.

A claim of prosecutorial misconduct based on the supposed use of the word "blood" in argument is answered by our order correcting the transcript to read "mud."

IV.

We reject each defendant's attack on the modified reasonable doubt instruction. *(People* v. *Light* (1996) 44 Cal.App.4th 879.)

DISPOSITION

The judgments are affirmed. (***CERTIFIED FOR PARTIAL PUBLICATION.***)

MORRISON, J.

We concur: DAVIS, Acting P.J.
CALLAHAN, J.

S082167

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOSHUA RICHTER, On Habeas Corpus

Petition for writ of habeas corpus is DENIED.

2006 U.S. Dist. LEXIS 24856

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA RICHTER,

Petitioner,

vs.

RODNEY HICKMAN, et al.,

Respondents.

CHRISTIAN BRANSCOMBE,

Petitioner,

vs.

ERNIE ROE, et al.,

Respondents.

Case No. S-01-CV-0643-JKS, (consolidated with, S-01-CV-0963-JKS)

March 24, 2006, Decided
March 24, 2006, Filed

COUNSEL: For Joshua Richter, Petitioner: Clifford Gardner, Law Office of Clifford Gardner, Oakland, CA; Edward W Swanson, Swanson & McNamara LLP, San Francisco, CA.

For Christian Branscombe, Petitioner: Allison Claire, Federal Defender, Capital Habeas Unit, Sacramento, CA.

For R Q Hickman, Warden, Cal A Terhune, Ernie Roe, Attorney General for the State of California, Respondents: Harry Joseph Colombo, California Attorney General's Office, Criminal/AWT, Sacramento, CA.

JUDGES: James K. Singleton. Jr., United States District Judge.

ORDER

INTRODUCTION

Joshua Richter petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Case No. S-01-cv-00643-JKS; Docket Nos. 1 (Petition); 8 (Answer); 10 (Traverse). Christian Branscombe petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Case No. S-01-cv-00963-JKS; Docket Nos. 17 (Second Amended Petition); 27(Answer); 31 (Traverse). Petitioners were jointly convicted by a jury of murder, attempted murder, and related charges in California state court. Both Petitioners are serving life sentences. Both Petitioners allege ineffective assistance of counsel and *Brady* violations. Petitioner Richter additionally alleges denial of due process due to an erroneous jury instruction.

FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural Background

On December 23, 1994, the Sacramento County District Attorney charged Joshua Richter and co-defendant, Christian Branscombe, with the murder of Patrick Klein, the attempted murder of Joshua Gunner Johnson, burglary, and robbery. Clerk's Transcript on Appeal ("CT") 16-20. Trial began on November 14, 1995. *Id.* at 182. On December 18, 1995, the jury found the petitioners guilty as charged. *Id.* at 318-25. Petitioners were subsequently sentenced to life imprisonment without the possibility of parole for the murder plus various determinate state prison terms. *Id.* at 389-95.

Both petitioners appealed the convictions. Id. at 396, 400. On March 20, 1998, the Court of Appeal of California upheld the convictions in a partially published opinion. 62 Cal. App. 4th 444, 64 Cal. App. 4th 807, 72 Cal. Rptr. 2d 773. On June 24, 1998, the Supreme Court of California denied petitioners' subsequent request for review. 1998 Cal. LEXIS 4252, 98 Cal. Daily Op. Service 4955.

Both petitioners filed for writs of habeas corpus, both of which were denied without published opinions by the California Supreme Court on March 28, 2001. *In re Joshua Richter on Habeas Corpus*, 2001 Cal. LEXIS 1946; *In re Christian Branscombe on Habeas Corpus*, 2001 Cal. LEXIS 1947. Petitioners thereafter applied to the United States District Court for the Eastern District of California for writs of habeas corpus. Because the issues presented in Petitioners' briefs were similar, on April 14, 2004, the Court issued an order consolidating both cases into Case No. S-01-cv-00643-JKS. Docket

No. 26. Upon the Order of this Court, the deposition of trial counsel for both Petitioners was taken. Docket No. 17. All parties have submitted supplemental briefing. Docket Nos. 32 (Branscombe's Supplemental Brief); 33 (Richter's Supplemental Brief); 34 (Respondents' Supplemental Opposition); 37 (Branscombe's Supplemental Closing); 38 (Richter's Supplemental Reply).

II. Factual Background

On direct appeal, the California Court of Appeal summarized the facts at trial as follows:

> [O]n the morning of December 20, 1994, defendants attacked the home of a friend, a drug dealer, Joshua Johnson. Johnson's home was used as a "party pad." Defendants shot Johnson and Patrick Klein; Klein died.
>
> They then stole Johnson's safe and about $6,000 in cash -- the proceeds from his daily drug sales.
> Johnson saw Branscombe shoot him but did not see Richter shooting. However, Klein was hit by two bullets, a .32 caliber and a .22 caliber. Branscombe had had a .32 earlier that evening. Johnson's safe was found at Richter's house where Johnson occasionally kept it.

People v. Branscombe, 64 Cal. App. 4th 807, at 2.[1]

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[1] The portion of the opinion quoted was not certified for publication. *See People v. Branscombe*, 64 Cal. App. 4th 807, 72 Cal. Rptr. 2d 773, 774 (1998).The unpublished portions are contained in the record of Branscombe's Petition prior to consolidation as Ex. 1 of Docket No. 27 (Respondent's Answer to Second Amended Petition).

As an extensive understanding of the investigation, trial, and divergent theories of the case are necessary for deciding the ineffective assistance of counsel claims, the facts pertaining to these items are appropriately developed at length herein.

A. Theories of the Case

Since all of the Petitioners' grounds for relief relate to the Petitioners' unsuccessful alternate theories of self-defense, it is necessary to understand at the outset the divergent theories presented at trial. At trial, the jury heard two very different theories explaining the evidence. Richter's brief summarizes it well:

> **From the state, the jury heard (1) Richter and Branscombe shot Klein and Gunner in the course of a robbery and not in self-defense, (2) Klein was shot in cold-blood on the couch, and (3) Richter and Branscombe took [Johnson's] safe that night from Gunner's house to Richter's house. From the defense, the jury heard (1) Branscombe entered the house to return property and money and was shot at, causing him to shoot in self-defense, (2) Klein was shot not on the couch while asleep but during a struggle in the bedroom, and (3) the safe was not moved to Richter's house that night, but had been there for several months.**

Docket No. 33 at 5. The State and defense presented these theories in opening statements on the fourth day of trial. See Reporter's Transcript on Appeal ("RT"), on Augment. Richter and Johnson both testified in support of their theories as to the events of December 19 and 20, 1994.

There was little conflict over the events preceding the shooting. See Docket Nos. 33 at 56; 34 at 3 -- 4; 32 at 2. Johnson, a drug dealer, had been living for about a month at 4620 Fair Oaks Boulevard in Sacramento with Graham Sargent and Tony Hithe. RT 467-68, 474, 480. The home was described by Johnson as a place where people "hung out" and smoked marijuana. RT 473-74. Johnson knew Branscombe through Hithe and considered Richter a really good friend. RT 471-72.

On the evening of December 19, 1994, Branscombe and Richter were waiting in Johnson's driveway when Johnson returned to his home accompanied by Klein and Noah Zonca. RT 1070. Johnson did not recognize the car Petitioners were sitting in so he jumped out of Zonca's car and approached them with his Mac-12 .380 handgun drawn. RT 488-90. Upon recognizing the Petitioners, Johnson put his gun away. *Id.* Zonca left and Johnson, Klein, Branscombe, and Richter went into the house together where they proceeded to hang out while Johnson, Klein, and Richter smoked marijuana. RT 492- 93, 1072-73. While they were socializing, Branscombe cleaned a .32 caliber handgun, which he had recently acquired from either Hithe or Johnson. RT 492-95, 1233. Richter and Branscombe left Johnson's some time shortly after 2:30 a.m. on December 20, 1994. RT 503-04, 1079-81. Klein decided to stay the night. RT 504. Although agreement exists as to the events of the evening, the jury heard two very different versions of what happened later that morning when Richter and Branscombe returned to Johnson's house.

Johnson testified that after the Petitioners left, Klein laid down on the couch, and he went to sleep in the bedroom. RT 504. Awakened by noises sometime during the early morning, Johnson sat up and saw the Petitioners in his bedroom with his gun safe between them. RT 507-09. Johnson testified that "Branscombe had a gun in his hand, and he shot me." RT 507. The shot knocked Johnson down and he remembered hearing voices and another gunshot. RT 510. When he heard the voices had moved to the front yard, Johnson got out of bed, turned on the light, and discovered that his Mac-12 and hip sack containing $6,000 in cash were missing. RT 510-13. After locking the deadbolt on the front door, Johnson went to call 911 and noticed Klein laying on the couch bleeding. RT 513-15.

Richter told a different story to the jury. Richter testified that he and Branscombe left Johnson's home to go remove their belongings, along with Hithe's, from a trailer at a Christmas tree lot where all three had been working. RT 1081-84. To do this they dropped off Richter's girlfriend's car and picked up Richter's truck. RT 1082. After loading their belongings into the truck, they returned to Johnson's around 4:00 a.m. so Branscombe could return the .32 caliber handgun, and to see if Hithe was home, as they were planning to give him his belongings from the trailer and his wages from the tree lot. RT 1085-87, 1233.

According to Richter's testimony, he stayed in the truck smoking a cigarette while Branscombe was let into the house by Klein. RT 1086-87. Shortly thereafter, Richter heard gunshots. RT 1087. When he realized what he had heard, Richter headed toward the house and heard yelling and more gunshots as he approached the front door. RT 1087-

89. Upon entering the house, Richter smelled gunpowder and blood and saw Klein laying in the doorway to Johnson's bedroom. RT 1089. Richter went to the bedroom door, turned the light on, and saw Branscombe, "totally freaked out," standing in the middle of the room holding a handgun and Johnson laying on the bed. RT 1089-91. According to Richter, Branscombe yelled "[t]hey tried to kill me, that they -- -- they fired." RT 1090. Branscombe picked up Johnson's Mac-12 from the floor and told Richter they had tried to shoot him with it. RT 1091. Branscombe then ran outside leaving Richter in Johnson's bedroom. RT 1091. When Richter heard Branscombe trying to start the truck he panicked and ran back outside. RT 1091-92. Richter got into the driver's seat and he and Branscombe left together. RT 1092-93.

B. Investigation

The State's case going into trial bears directly upon the reasonableness of strategic decisions made by Petitioners' counsel. In order to eliminate the prejudice of 20/20 hindsight as much as possible, it is important to understand the context in which pretrial decisions were made. The facts of the State's investigation are therefore examined at length.

Pursuant to a 911 call made by Johnson, Deputies Wright and Larson were dispatched to the scene around 5:00 a.m. on December 20, 1994. RT 27. Upon arriving at the scene at 5:06 a.m., Wright contacted a hysterical and bloody Johnson. RT 27-31. When Wright entered he house he saw Klein, fully dressed and laying on top of a sleeping bag on the couch in the living room. RT 32, 42. Although Wright detected no signs of life in Klein, paramedics later found a cardiac rhythm and transported Klein to the UC Davis Medical Center ("UCDMC") where he died. RT 33, 35, 44, 62. After calming Johnson down, Wright took a brief statement from him, during which he noticed that Johnson was not just bloody, he had also been shot in the cheek and the shoulder. RT 36-38. Johnson was taken to the UCDMC where Officer Ferry took a further statement in which Johnson implicated Richter and Branscombe RT 62, 922, 930-31. Johnson told Ferry that Branscombe had shot him, and that he and Richter had taken his gun safe and about $6,000 in cash. RT 930-31.

Homicide detectives Maulsby and Bell did an initial walk-through around 7:45 a.m. and finished processing the crime scene by 10:10 a.m. RT 94-95. It was apparent to Bell that the forensic evidence was consistent with the statement made by Johnson and that a detailed blood splatter analysis would not be necessary. RT 203-04. A spent .32 casing and a spent CCI brand 22 casing were found in the living room near the couch where Klein was found by the deputies. RT 117-18, 769. Blood splatter on the armrest and a concentration of blood on the end of the couch where Klein's head was resting were present when the deputies arrived. RT 119-20. Two spent .32 casings were found in the bedroom where Johnson said he was shot. RT 127-28. Blood was found on the bed where Johnson said he was shot. RT 125-26. There were blood drops and transfers throughout the house, and a blood pool in the doorway of the bedroom that appeared to have been "foot stomped." RT 109-10, 115-17, 119-20, 138-29.

By noon, the investigators had turned their investigation to a garage where Richter had been living. RT 445. In the garage they found Johnson's gun safe haphazardly laying on its back. RT 423, 433-

34, 447, 1179-80. They also discovered two boxes of CCI brand .22 cartridges and a magazine loaded with live CCI Stinger .22 cartridges. RT 425, 765. The cartridges found in the magazine were the same type as the spent .22 casing found in the living room of Johnson's home. RT 765, 769.

Richter and Branscombe were found and arrested the following afternoon on December 21, 1994. RT 1114, 1125. Later that evening, Richter led his attorney and Detective Bell to a very remote location where he and Branscombe had allegedly thrown Johnson's .380 caliber Mac-12 and Branscombe's .32 caliber handgun. They did not locate either firearm, but Bell did find a $100 bill approximately twenty-five to fifty yards away from the area indicated by Richter. RT 454-56, 461-62. Richter's attorney managed to find the Mac-12 the following day, but the weapons which fired the bullets striking Klein and Johnson were never recovered. RT 1136-37.

Subsequent examination of the bullets, casings and cartridges recovered during autopsy and at Johnson's and Richter's respective homes further implicated Richter. Robert Garbutt, a journeyman level criminalist for the Sacramento County Sheriff's Department, determined that the .22 caliber bullet removed from Klein was a CCI Stinger and had markings consistent with being fired from a High Standard Sport King. RT 757-58, 769-70. He also determined that the spent .22 casing found in the living room of Johnson's home had microscopic markings consistent with having been ejected from a High Standard Sport King. RT 769-70. Although the firearm that fired the .22 caliber bullet found in Klein was never recovered, the magazine loaded with CCI Stingers found in Richter's garage was identical in size and shape to High Standard magazines designed specifically for a Sport King. RT 759-63. In fact, the magazine found in Richter's garage was inserted by Garbutt into a laboratory exemplar High Standard Sport King and successfully fired. RT 761.

Although the State processed latent fingerprints and conducted extensive analysis of the ballistic evidence, the blood evidence at the crime scene does not appear to have been emphasized during the State's investigation. Detective Bell did not conduct a blood splatter analysis while he was processing the scene, or at any time before trial. RT 158, 203-04. The State collected only 6 blood samples from the scene. RT 259-62. The State did not test the blood prior to trial. RT 886-888. The State had not even drawn blood from Johnson for comparative analysis before trial. RT 855, 886. Given the forensic evidence and its consistency with the surviving victim's statement, the State merely collected a few blood samples and documented the scene with video and photographs. See RT 203-04.

C. Trial

Trial began on November 14, 1995. CT at 182. Petitioner Richter was represented by Mark Axup ("Axup"). RT at 3. Petitioner Branscombe was represented by Tom Dixon ("Dixon"). *Id.* Steve Grippi ("Grippi") prosecuted the case for the State. *Id.* Grippi and Axup outlined their theories of the case through their opening statements during the morning session of the fourth day of the trial. See RT on Augment. Axup told the jury that the physical evidence would support the defense's theory of the case. RT on Augment at 26-27. Axup told the jury that they would find Johnson's story inconsistent and incredible. RT on Augment at 28-31. Axup told the jury that he believed that there would be testimony from experts and lay witnesses which would support certain elements of the defense's theory of the case. RT on Augment at 32-33.

Grippi, having heard Axup's self-defense theory during opening statements, scrambled to plug the evidentiary holes it appeared Axup was moving to exploit. Grippi called Detective Bell during the lunch recess of the fourth day to ask him to analyze the blood evidence with regard to Axup's theory. RT 158. Just a few hours later, Bell was on the stand, not just as the detective who processed the scene, but certified as an expert in blood spatter. RT 103-04. On the fifth day of trial, November 21, 1995, Grippi sent Investigator Maloney back to Johnson's home to look for any additional bullet holes in Johnson's bedroom which might support the self defense theory. RT 848. On the same day, Grippi had Johnson give a blood sample and sent the blood evidence to be tested and analyzed. RT 855-56, 886-88. On day nine of trial, Grippi put Maloney and an expert in serology on the stand to close the evidentiary holes exploited by Axup. RT 818-921.

Axup began presenting the defense's case on the ninth day of trial, November 29, 2005. RT 922. Axup called seven witnesses, including Richter. RT at vii-ix. None of the witnesses presented by Axup were experts. Docket 33, Exhibit M, Axup's Deposition ("AM), at 26-27. The defense rested on day thirteen. RT at 1271. Grippi presented rebuttal witnesses on day fourteen. RT at x. Closing arguments were heard on days fifteen and sixteen. RT at xi. The jury was instructed on day seventeen and returned with a verdict on day nineteen of trial, December 18, 1995. RT at xi.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act ("AEDPA") permits a federal court to grant relief in habeas corpus petitions only if the state court's decision: (1) was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States;" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). "The first prong applies both to questions of law and to mixed questions of law and fact, while the second prong applies to decisions based on factual determinations." *Davis v. Woodford,* 333 F.3d 982, 990 (9th Cir. 2003) (citations omitted). A state court's determination is "contrary to' federal law if the state court (1) applies a rule that contradicts the governing law' set forth in Supreme Court case authority or (2) applies controlling law to a set of facts that are materially indistinguishable' from a Supreme Court decision but nevertheless reaches a different result." *Ortiz-Sandoval v. Clarke,* 323 F.3d 1165, 1169 (9th Cir. 2003) (citing and quoting *Lockyer v. Andrade,* 538 U.S. 63, 123 S. Ct. 1166, 1173, 155 L. Ed. 2d 144 (2003)). A state court's decision is an "unreasonable application" of federal law if it is "objectively unreasonable," which "requires the state court decision to be more than incorrect or erroneous." *Lockyer,* 123 S. Ct. at 1174.

Where a state court fails to provide any reasoning for its decision, as where it rejects the constitutional claim in a summary fashion without explanation, the process of determining objective" unreasonableness is more complicated because there is no state court decision to analyze. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). Where a state court rejects a claim without any analysis, the district court must "perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable." *Id.* at 853. The independent review is the "only method" by which a district court can "determine whether a silent state court decision is objectively unreasonable." *Id.*

I. Richter v. Hickman, S-01-cv-00643-JKS

Petitioner Richter alleges that a writ must issue because: (1) he received ineffective assistance of counsel when his attorney, Axup, failed to introduce evidence at trial in support of the defense's theory; (2) his due process rights were violated when the prosecution suppressed evidence in violation of *Brady*; and (3) his due process and jury trial rights were violated when the trial court misinstructed the jury on the felony murder rule. Docket No. 33 at 26, 36, 41.

A. Ineffective Assistance of Counsel Claim

The Constitution guarantees the right to a fair trial through the Due Process Clauses of the Fifth and Fourteenth Amendments and defines the basic elements of a fair trial in the Sixth Amendment. ***Strickland v. Washington***, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A fair trial, in essence, "is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id.* at 685. Because the right to counsel plays such a crucial role in the adversarial system, it is not enough that a lawyer merely be present at courtroom proceedings; a lawyer must, at the very least, demonstrate a basic level of competency. *Id.* This conclusion follows directly from the purpose of the Sixth Amendment, which "is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-92.

To make a successful Sixth Amendment ineffective counsel challenge to a state court judgment, a petitioner must demonstrate that (1) his trial counsel's performance fell below an objective standard of reasonableness, and (2) but for these deficiencies, a reasonable probability exists that the outcome of the trial would have been more favorable to him. *Id.* at 687-88, 691-92. In reviewing counsel's performance, this Court must "strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that [counsel] exercised acceptable professional judgment in all significant decisions made." *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990) (citing *Strickland*, 466 U.S. at 689; *Weygandt v. Ducharme*, 774 F.2d 1491, 1493 (9th Cir. 1985)). As the Supreme Court explained in *Strickland*:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls

> within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). In light of *Strickland*, the Ninth Circuit has charted a course of contemporary assessment, where an attorney's actions must be examined according to what was known and reasonable at the time. *Deutscher v. Whitley*, 884 F.2d 1152, 1159 (9th Cir.1989) (vacated on other grounds, *Angelone v. Deutscher*, 500 U.S. 901, 111 S. Ct. 1678, 114 L. Ed. 2d 73 (1991)).

1. Objective Standard of Reasonableness

Richter asserts that Axup's promise to deliver during opening statements and his subsequent failure to develop and put on certain evidence fell below the objective standard of reasonableness. Docket No. 33 at 26-33. Specifically, Richter points to Axup's failure to develop and/or present evidence in the areas of: (1) serology and blood splatter; (2) ballistics; and, (3) the location of Johnson's safe during the shooting. Docket No. 33 at 14-20. Richter has submitted the declarations of witnesses who would have been available to testify during trial.

i. Serology and Blood Splatter

As to serology and blood splatter, Richter provides declarations from: (1) Dr. John Thornton, a forensic scientist; (2) Dr. Paul Herrmann, a medical doctor and forensic pathologist; (3) Ken Moses, a forensic criminologist; and (4) Brian Wraxall, a forensic serologist. Docket No. 33, Exs. E, F, G, L. Thorton and Wraxall, after reviewing the blood type evidence in this case, would have testified, contrary to the State's serology expert, that Klein could not be reliably excluded as a contributor to the pool of blood found in the doorway of Johnson's bedroom. *Id.* at E; L. Herrmann, after examining applicable photographs, parts of the transcript from trial, and the autopsy report, would have testified that the State's theory that Johnson deposited the pool of blood in his doorway is scientifically unreliable. *Id.* at F. Moses, after reviewing applicable photos, parts of the transcript, and the autopsy report, would have testified that pool of blood in the doorway of Johnson's bedroom could not have been made by someone standing and dripping blood. *Id.* at G. Richter asserts that Axup should have found these experts to support the defense's theory that Klein was shot in the doorway during a struggle.

After accounting for the distorting effect of hindsight, the Court is not persuaded that Axup's failure to produce this evidence fell below the objective standard of reasonableness. Axup's pretrial investigation and study led him to the belief that the trial would be primarily a credibility case. AD at 51. The State implicitly agreed with Axup by not preparing a blood spatter analysis or even testing any of the blood samples taken from the crime scene. Given the lack of blood evidence developed by the State prior to trial, Axup's failure to find and produce the expert testimony at issue does not fall below the standard.

Axup's failure to find and call these experts after he was surprised at trial by the sudden presentation of expert blood spatter and serology testimony was also reasonable. Axup did what he could under the circumstances. Axup objected to Bell being called as an expert witness, moving to exclude the testimony and/or for a preliminary facts hearing; both motions were denied. AD at 152. Axup objected to the surprise expert testimony on serology and requested more time to prepare; this motion was denied as well. AD at 35, 48, 77. Axup spent the night studying serology and the State's expert's report at the library to prepare for cross-examination. AD at 78-82. If Axup had been given more notice of the State's expert testimony, this question would have been closer, but given the way events unfolded, the Court is persuaded that Axup's actions were reasonable.

ii. Ballistics

Part of the defense's self defense theory was that Johnson's Mac-12 jammed when Johnson fired it at Branscombe. Richter testified that as they drove to a remote area after the shooting, Branscombe examined Johnson's Mac-12 and discovered a spent casing was jammed in the receiver. RT 1098-99. A spent .380 casing was found in Richter's truck when he was arrested. RT 385. After Axup recovered the Mac-12, the State's criminalist, Robert Garbutt, examined it and discovered that someone had removed the circlip retainer and ground and polished part of the receiver in an attempt to make it fully automatic. RT 784-86. On cross-examination, Garbutt testified that the alterations could potentially cause the weapon to misfire, but that he did not know if it would cause a failure to eject. RT 784-85. Garbutt also testified that he had test-fired the Mac-12 three times and it had not failed to fire or to eject the spent casing properly. RT 785-86. Axup spoke with two weapon's experts before trial about the likelihood of the altered Mac-12 jamming, but did not call his own expert. AD 27-32.

Richter now submits the declaration of Daniel Joseph, a firearms and ballistics expert. Docket No. 33, Ex. K. After examining Johnson's Mac-12, Joseph states that he would have testified that the alterations made to the weapon could have caused a failure to eject. *Id.* Richter asserts that Axup's failure to put a firearms expert on the stand fell below the standard of objective reasonableness.

The Court is not persuaded that Axup's decision not to augment Garbutt's testimony fell below the standard of reasonableness. Axup claimed in his deposition that he believed the Mac-12's propensity to jamming had been established during the cross examination of Garbutt. AD 14-15, 164-65. Axup felt at the time that Garbutt's testimony was enough in conjunction with the spent .380 casing found in Richter's truck. AD 62. Axup was mistaken about what the defense had actually gotten from Garbutt on cross-examination, but his mistake was reasonable. The differences between a misfire and a failure to eject are technical and could easily be confused during the examination of an expert.

Richter alleges Axup made a second blunder in the area of ballistics. The defense's theory that the Mac-12 jammed would have been bolstered if a bullet hole consistent with being made by a .380 caliber bullet had been found in Johnson's house. No such bullet holes were found prior to trial. See RT 840-48. Axup in his opening statement alleged that there was a .22 caliber bullet hole in the floor of Johnson's room. RT on Augment at 37. The next day, November 21, 1995, Grippi sent Investigator Maloney ("Maloney") back to Johnson's home to look for any additional bullet holes in Johnson's bedroom which might support the self defense theory. RT 848. Maloney found a bullet hole in the floor that he believed was consistent with a 22 caliber bullet. RT 848. He photographed the hole with a measuring device next to it for reference. RT 852-53. In an unsuccessful attempt to find the bullet that made the hole, Maloney cut out the section of floorboard that had the bullet hole in it. RT 849. The section of floorboard fell into the crawl space and is now the subject of Petitioners' *Brady* claim. Here however, Richter alleges his counsel rendered ineffective assistance by failing to investigate the bullet hole further.

Richter now provides the declarations of Dale Richter, the Petitioner's father, and James Aiello, a ballistics expert. Docket No. 33, Exs. A; C. After trial, Dale Richter went into the crawlspace beneath Johnson's room and located the section of floorboard cut out by Maloney. *Id.* at A. Dale gave the section of floorboard to Axup. *Id.* Axup had the section of floorboard examined by Aiello. *Id.* at C. Aiello, after examining the bullet hole and conducting a comparative analysis, concludes that the bullet hole was made by a .380 caliber bullet. *Id.*

The Court is not persuaded that Axup's decision to not collect the floorboard before or during trial fell below the standard. The investigators for both the State and the defense believed the bullet hole was made by a .22 caliber bullet. RT 848; RT on Augment at 37. Axup had no reason to believe the hole was anything but what the investigators had found. Although it turns out that both investigators were mistaken, their mutual mistake does not make Axup's reliance unreasonable at the time.

iii. Location of the Safe

Axup told the jury in his opening statement that he believed Stephanie Edwards and Linda Stewart would give testimony indicating that Johnson's safe was in Richter's garage before the shooting. RT on Augment at 32. Axup put Stephanie Edwards on the stand and she testified that she saw the safe in the garage on December 19, 1994. RT 1018-19. Although Johnson admitted that he occasionally kept the safe in Richter's garage, he testified that he and a friend had moved the safe to Johnson's home some time around the end of November or beginning of December. RT 483-84, 485. Scott Brown corroborated Johnson's story, testifying he helped Johnson move the safe during that time period. RT 1304.

Richter now presents the declarations of Madalyn Edwards, Richter's girlfriend's sister, and Shane Westburg and Linda Stewart, Richter's former housemates. Docket No. 33, Exs. H, I, J. Madalyn declares that she would have testified that the safe was still in Richter's garage during her visits to the house from December 3 through 10. *Id.* at H. Both Westburg and Stewart declare that they would have testified that their dogs would have woken them up if Richter and Branscombe had brought the safe to Richter's house in the early morning of December 20, 1994. *Id.* at I; J. Richter asserts that Axup's decision to not call these witnesses after telling the jury he believed they would testify fell below the objective reasonable standard.

The Court is not persuaded Axup's decision falls below the standard of reasonable assistance. First, Axup states that he made a tactical choice not to call these particular witnesses because he felt their testimony on balance would have been detrimental to the defense. AD 92-97, 147-48. Second, the State and the defense presented two witnesses each that testified as to the location of the safe prior the shooting. The jury obviously found the State's witnesses more credible. Given the strong presumption of reasonable assistance from *Strickland*, and the defense's presentation of testimony as to the location of the safe, Axup's tactical decision to not call the witnesses in question was reasonable.

2. Prejudice

To make a successful Sixth Amendment ineffective counsel challenge to a state court judgment, a petitioner must also show that but for the deficient counsel, a reasonable probability exists that the outcome of the trial would have been more favorable to him. *Strickland*, 466 U.S. at 687. The Ninth Circuit has held that "it is unnecessary to consider the prejudice prong of *Strickland* if the petitioner cannot even establish incompetence under the first prong." *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998) (citing *Hendricks v. Calderon*, 70 F.3d 1032, 1039 (9th Cir. 1995)). Because Richter has not established incompetence under the first prong, the Court will not examine the second.

B. Brady Claim

Richter makes the argument in both his petition and supplemental petition, that he was denied due process when the prosecution suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Docket Nos. 1, at 23-31; 33, at 36-39. The Court has previously indicated, at length, its view of this argument. Docket No. 17 (Order dated November 17, 2003). Nothing presented in Petitioner's supplemental briefing persuades the Court from its initial views regarding this claim. This claim fails.

C. Jury Instruction Claim

In this Court's November 17, 2003 Order, this issue was addressed as follows:

> It is not clear that this issue presents a problem of due process cognizable in federal court. It appears that the California Court of Appeals found no state error. If this is true, then Richter cannot contend that the process violated state law. He must prove there was an independent violation of federal constitutional law since this Court has no jurisdiction to review decisions of state courts applying state law.

Docket No. 17 at 4.

The jury sent the trial court a note during deliberations, which read as follows:

> Clarification of Instructions: [31]
>
> If a defendant is found guilty of Robbery & Burglary in the first degree, it is our understanding that this necessarily lead to a guilty verdict of murder in the first degree if a human being is killed during the commission of the above Robbery and Burglary.
>
> Also, if a defendant is found to have aided & abetted in the above Robbery/Burglary is he guilty of all charges (or can you find him guilty of lesser charges) as found for the other defendant.

CT at 316. The trial court's clerk's minute order reflects that "After conferring with the all [sic] counsel, the court sent the following reply: 'Yes. (To the first question) The "felony murder rule" applies only to murder, not attempted murder.'" *Id.*

Since any instruction error that may have occurred happened in state court, it is a given that this Court cannot grant habeas corpus based upon state law errors. *See Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). When it comes to instructional errors, the Supreme Court has made it clear that:

> The only question for us is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. In addition, in reviewing an ambiguous instruction . . . we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that

> violates the Constitution. And we also bear in mind our previous admonition that we "have defined the category of infractions that violate 'fundamental fairness' very narrowly."

Id. at 72 (citations and footnote omitted).

In this case, it has not been established that the instruction, or its clarification, was so defective that the entire trial was "infected." As the California Court of Appeal stated, ". . . the phrasing of the jury note indicates it was confused about application of the felony-murder rule . . . [. . .] The trial court's answer was not incorrect, at worst it did not fully state the rules of aider liability *apart from the felony-murder rule.*" *People v. Branscombe*, 64 Cal. App. 4th 807, 72 Cal. Rptr. 2d 773, 781 (1998) (emphasis in original).

In addition, when viewing the instruction and clarification as a whole, as required, it appears that the jury was given a special circumstance instruction and, in answering it in the affirmative, found that Richter's involvement in the robbery of Johnson, whether as a direct perpetrator, or as an aider and abettor, commenced before or during the killing of Patrick Klein. CT at 266-268; 318. This precludes any reasonable likelihood that the jury may have applied the instruction, and subsequent ambiguous clarification, in a way that violates the Constitution. Therefore, because the State court's denial of habeas relief is neither "contrary to," nor involved "an unreasonable application of clearly established federal law," under 28 U.S.C. § 2254, Richter is not entitled to relief on this ground.

II. Branscombe v. Roe, S-01-0963 (JKS)

Petitioner Branscombe asserts that a writ must issue because: (1) he was effectively unrepresented at trial; (2) his counsel, Tom Dixon ("Dixon") failed to develop and present expert testimony on critical forensic issues; and (3) his due process rights were violated when the prosecution suppressed evidence in violation of *Brady*. Docket No. 32 at 16, 23, 31.

A. Constructive Denial of Counsel Claim

Branscombe alleges that he was constructively denied counsel because Dixon altogether failed to investigate or prepare for trial. Docket No. 32 at 17. Axup gave a scathing review of Dixon's preparation for and performance at trial. Branscombe's memorandum summarizes Axup's testimony:

> Dixon did not participate in investigation or pre-trial preparation, failed to communicate pre-trial about matters of common concern, failed to consult with co-defendant's counsel regarding the advisability of joint trial or the need for severance, had not read all the police reports on the day set for jury selection, conducted jury selection without having reviewed the jury questionnaires, was unfamiliar with the evidence and witnesses as the trial began, conducted cross-examination by the seat of his pants, subpoenaed no witnesses of his own, and refused to assist in research related to mid-trial developments. Mr. Axup's testimony strongly suggests that Mr. Dixon took the case in order to earn a final

> $20,000 before losing his ability to practice law, and did little to earn that fee other than show up at trial to try to "razzle dazzle" the jury.

Docket No. 32 at 17-18 (citations omitted). Although Dixon was sure at his deposition that he must have prepared for the trial, he had no specific recollection of doing so. *See, e.g.*, Deposition of Dixon at 20-30.

Branscombe argues that his current claim has not been "adjudicated on the merits," because it is now bolstered by the depositions of trial counsel and not merely the trial record. Docket No. 37 at 3. On direct appeal, the Court of Appeal of California rejected Branscombe's constructive denial of counsel argument. *People v. Branscombe*, 64 Cal. App. 4th 807, 72 Cal. Rptr. 2d 773, 781 (1998). The appellate court recognized that Dixon made no opening statement and called no witnesses, but found that the face of the record indicated that Dixon had tested the prosecution's case providing an "active defense." *Id.* "Trial counsel (1) successfully moved to exclude evidence, (2) successfully moved to suppress statements, (3) made numerous objections, (4) cross-examined most of the witnesses, (5) moved successfully to strike testimony, and (6) had a witness perform a demonstration." *Id.*

The Supreme Court has "identified three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in particular case is unjustified.'" *Bell v. Cone*, 535 U.S. 685, 695, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (quoting *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657-59 (1984)). The three situations are: (1) when there has been a complete denial of counsel at some critical stage of the trial; (2) where "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;'" and (3) "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Id.* at 659-60 (citations omitted), In these situations, prejudice to the defense is found per se. *Cronic*, 466 U.S. at 658-59.

Branscombe argues that Dixon's conduct falls into the second exception to *Cronic*, and that *Cronic* is the proper test for his claim. Docket No. 32 at 16-23. Branscombe's argument is not that Dixon failed to oppose the prosecution throughout some portion of the trial, but that Dixon's opposition wasn't meaningful because Dixon completely failed to investigate and prepare for trial. Although neither the Supreme Court or the Ninth Circuit have extended *Cronic* to situations where the defense counsel failed to investigate and prepare for trial, Branscombe argues that it was unreasonable for the state court to not do so in these circumstances. Docket No. 37 at 7.

The Court is not persuaded that the California Supreme Court's failure to extend Cronic was unreasonable. First, the United States Supreme Court has found that the failure to test the prosecution's case must be complete: "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) quoting *Cronic*, 466 U.S. at 659). Branscombe's attempt to distinguish *Cone* is inapposite. Axup's testimony indicates that

Dixon was not as prepared as he should have been, but it does not show that Dixon's failure was complete. According to Axup, they did meet prior to trial to discuss theories of defense and Dixon was still reading the police reports. AD 99-100. This may be deficient preparation, but it is not the complete absence of preparation. Dixon's cross-examinations also reveal some degree of preparation. See e.g. Dixon's cross examination of Robert Garbutt, RT 783-87. Finally, the Ninth Circuit's use of the *Strickland* standard for claims of failure to investigate demonstrates the appropriateness of the *Strickland* standard in this situation. *See e.g. Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999).

Therefore, because the state appellate court's ruling on Branscombe's constructive denial of counsel claim is neither contrary to, nor an unreasonable application of, controlling federal law, Branscombe's claim that his Sixth Amendment rights were denied on the basis of constructive denial of counsel must be rejected.

B. Ineffective Assistance of Counsel Claim

In addition to the arguments presented by Richter above, Branscombe alleges that his Sixth Amendment right to counsel was violated because his defense counsel faced an impending California Bar suspension. Docket Nos. 17 at 2-13; 32 at 16-23.

As noted earlier, to make a successful Sixth Amendment ineffective counsel challenge to a state court judgment, a petitioner must normally demonstrate that (1) his trial counsel's performance fell below an objective standard of reasonableness, and (2) but for these deficiencies, a reasonable probability exists that the outcome of the trial would have been more favorable to him. *Strickland* 466 U.S. at 687-88, 691-92. Having dealt with Branscombe's argument to apply a *Cronic* standard to his claim above, the Court will apply the *Strickland* standard to Branscombe's related claims of ineffective assistance here.

1. Dixon's pending California Bar suspension

Branscombe asks the Court to take judicial notice of Thomas Dixon's complete State Bar disciplinary records. Docket 32 at 14. The records include orders of the California Supreme Court and official records of the California State Bar Court. *Id.* at Exhibit 2. The records are proffered for their relevance to Dixon's credibility and his competence. Docket 32 at 14-16. Courts may take judicial notice of adjudicative facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

It is true that counsel's disbarment or suspension, either before or during trial, may raise doubts about his competence. However, the Ninth Circuit has observed that the actual effects of any such doubts are appropriately addressed by the guidelines given in *Strickland* for ineffective assistance of counsel claims. *See United States v. Mouzin*, 785 F. 2d 682 (9th Cir. 1986); *United States v. Hoffman*, 733 F.2d 596 (9th Cir. 1984). Thus, the fact that Branscombe's lawyer was facing a suspension at the conclusion of Branscombe's trial may be immaterial to the ineffective assistance claim.

This Court will judicially notice the offered exhibit only for the proposition that Mr. Dixon was facing suspension from the practice of law in January 1995. In light of Dixon's pending suspension from the California Bar, Branscombe must identify "actual errors and omissions by counsel that a conscientious advocate would not have made," and show that he suffered prejudice from those errors in order to prevail on this aspect of his ineffective assistance claim. *Mouzin* at 696; *Strickland*, 466 U.S. at 687.

a. Objective Standard of Reasonableness

Under *Strickland*, petitioners face a strong presumption that a attorney's trial strategy and demeanor at trial is objectively reasonably. *Id.* at 694-695. In the instance case, this Court ordered Branscombe's trial counsel deposed. Docket No. 34. Nothing existed in the record originally provided by the parties "in which Branscombe's trial counsel address[ed] each of Branscombe's allegations regarding his (trial counsel's) alleged ineffectiveness. Nor [did] trial counsel explain his actions or, in some cases, his inaction." *Id.* Dixon's lack of memory during his deposition, however, places the Court in the awkward position of evaluating Dixon's behavior based upon the testimony of Richter's trial counsel, Mark Axup, and the declaration of Mr. Branscombe's first retained trial lawyer, Mr. Dorfman. Docket Nos. 32 (Deposition of Thomas Dixon; Declaration of Dorfman, at Exhibit 1); 33 (Deposition of Mark Axup, at Exhibit M).

Branscombe makes the following arguments:

> First, Dixon unethically breached Mr. Branscombe's preexisting attorney-client

> relationship with Mr. Dorfman. He then arranged to take an entire $20,000 inheritance to try a case he had no reasonable possibility of preparing. He ignored professional advice to seek a competency evaluation, because the resulting delay was contrary to his financial interest in having the trial over before his suspension went into effect. He declined to seek continuances for further investigation which would have been beneficial to the defense, also because delay was contrary to his financial interest.

Docket No. 32 at 21-22 (citations omitted).

Additionally, no agreement existed between Axup and Dixon about a division of labor. AD 98, 101. And, although Dixon unilaterally told Axup that he was "comfortable" leaving witness interviews up to him, Axup had never agreed to single-handedly conduct a joint investigation. AD 102.

It is conceivable to this Court that Dixon's representation of Branscombe, under the circumstances of his pending suspension, full trial schedule, and apparent financial constraints, may have fallen beneath an objective standard of reasonableness.

b. Prejudice

Nevertheless, Branscombe still must demonstrate that any objectively unreasonable behavior by his counsel at trial was prejudicial to him as well. The question becomes whether, absent the errors, there is a reasonable probability that the factfinder would have had a reasonable doubt as to guilt. *Strickland*, at 695. In other words, Branscombe must show that the decision reached would have likely been different absent the errors. *Id.* at 696.

The errors in question due to Dixon's pending bar suspension support the notion that Dixon was a lawyer facing a suspension from the practice of law. Dixon's questionable nature of attaining Branscombe as a client, his seeming lack of preparation due to a full schedule, his refusal to ask for a continuance, his failure to collaborate with Richter's counsel, all these things suggest with any certainty, is that Dixon was distracted before trial. They do not demonstrate that the jury would have found differently for Branscombe at the conclusion of the trial. Branscombe has not shown prejudice by his trial counsel's pending bar suspension.

2. Failure to present expert and lay testimony

In addition to his pending bar suspension, Branscombe argues that his counsel was constitutionally deficient in failing to develop and present expert testimony on critical forensic issues. Docket 32 at 23. Specifically, he claims Dixon failed to develop evidence regarding the jamming of the Mac-12 gun, and the state's serology and blood spatter evidence. These are the same claims made by Richter above, and rejected by this Court. For the reasons already stated, Branscombe's similar arguments will be similarly rejected.

C. Brady Claim

Likewise, this claim has been examined previously. It was presented by Richter, with Branscombe merely joining Richter's argument.

Docket No. 32 at 31. For the reasons stated above, this claim fails.

IT IS THEREFORE ORDERED:

Joshua Richter's petition for a writ of habeas corpus at **Docket Nos. 1** and **33** is **DENIED**. Christian Branscombe's petition for a writ of habeas corpus at **Docket Nos. 17** and **32** is **DENIED**.

In addition, appeal may not be taken without a certificate of appealability from either this Court or from the Ninth Circuit Court of Appeals. 28 U.S.C. § 2253. The standard for granting a certificate of appealability has been stated as follows: "Where a district court has rejected the constitutional claims on the merits . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *United States v. Zuno-Arce*, 339 F.3d 886, 888-89 (9th Cir. 2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). Petitioners have made no such showing. The trial court's alleged errors in jury instructions and admission of evidence do not violate due process and thus are not sufficient grounds to grant his petition. Nor do Petitioners' claims of ineffective assistance of counsel establish a basis for habeas corpus relief. The state court applied the correct United States Supreme Court standard and thus there was no violation of federal law. The same is true of the state court's denial of a new trial. For these reasons, this Court will not issue a certificate of appealability in this case. Richter or Branscombe may seek a certificate of appealability directly from the Ninth Circuit Court of Appeals' motions panel.

Dated at Anchorage, Alaska, this 24th day of March 2006.

/s/ James K Singleton, Jr. .
United States District Judge

JUDGMENT IN A § 2254 CASE

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioners' applications for relief pursuant to 28 U.S.C. § 2254 are DISMISSED.

APPROVED:

/s/ James K Singleton, Jr. .
United States District Judge

March 24, 2006

521 F.3d 1222; 2008 U.S. App. LEXIS 7516

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSHUA RICHTER,

Petitioner-Appellant,

v.

R. Q. HICKMAN, Warden; CAL A. TERHUNE; ERNIE ROE,

Respondents-Appellees.

No. 06-15614

CHRISTIAN BRANSCOMBE,

Petitioner-Appellant,

v.

R. Q. HICKMAN, Warden; CAL A. TERHUNE; ERNIE ROE,

Respondents-Appellees.

No. 06-15776

Appeal from the United States District Court
for the Eastern District of California.
James K. Singleton, Chief District Judge, Presiding.

Argued and Submitted
October 15, 2007 -- San Francisco, California

Filed April 9, 2008

Before: Robert R. Beezer, Stephen S. Trott, and
N. Randy Smith, Circuit Judges.

Opinion by Judge Beezer

COUNSEL

Cliff Gardner, Oakland, California, for petitioner-appellant Joshua Richter.

Ann C. McClintock, Assistant Federal Defender, Sacramento, California, for petitioner-appellant Christian Branscombe.

Harry Joseph Colombo, Deputy Attorney General, and John G. McLean, Supervising Deputy Attorney General, Sacramento, California, for the respondents-appellees.

OPINION

BEEZER, Circuit Judge:

Appellants in these two consolidated cases were jointly convicted of murder, attempted murder, robbery and burglary in California state court. They were sentenced to life in prison without the possibility of parole. In the present action, they appeal the district court's denial of writs of habeas corpus. Appellants allege that they received ineffective assistance of counsel at trial in violation of

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Appellants further allege that the prosecution suppressed exculpatory evidence at trial in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Appellant Christian Branscombe ("Branscombe") argues that his trial counsel failed to engage in "meaningful adversarial testing" in violation of *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Appellant Joshua Richter ("Richter") alleges that the trial court violated his Eighth Amendment right to a jury trial and Fourteenth Amendment right to due process by providing an incorrect or inaccurate answer to a question of law posed by the jury to the trial court. We affirm the district court's denial of appellants' habeas petitions.

I

Joshua Gunner Johnson ("Johnson"), a friend of Richter and acquaintance of Branscombe, lived in a house in Sacramento. On the evening of December 19, 1994, Richter and Branscombe drove to Johnson's house so that Richter could pay Johnson some money he owed him and buy some marijuana from him. Richter and Branscombe were waiting in their car in Johnson's driveway when Johnson returned home, accompanied by Patrick Klein ("Klein") and another individual. Johnson did not recognize the car, and approached the car with his .380 caliber Mac-12 handgun drawn. Upon recognizing the petitioners, Johnson put the Mac-12 away. Johnson, Klein, Richter and Branscombe went into the house, where they socialized for several hours. While they talked, Branscombe cleaned a .32 caliber handgun that he had recently acquired from either Johnson or Johnson's housemate. Richter and Branscombe left Johnson's residence shortly after 2:30 a.m. on December 20, 1994. Klein decided to stay the night.

At trial, appellants and appellee State of California ("the State") presented different accounts of the ensuing events. The State presented evidence that after Richter and Branscombe left, Johnson went to sleep in his bedroom and Klein lay down on the couch in the living room. Johnson woke up early in the morning to find Richter and Branscombe in his bedroom, likely attempting to steal Johnson's gun safe, which was allegedly located in Johnson's bedroom closet. Branscombe shot Johnson, and Johnson later heard gunshots coming from another room. Johnson found Klein lying on the couch bleeding and discovered that his Mac-12 was missing, along with a hip sack that contained $ 6000 in cash.

Richter and Branscombe presented evidence that they returned to Johnson's residence around 4:00 a.m. so they could give Johnson's housemate certain belongings and wages, and so that Branscombe could return the .32 caliber handgun. Richter stayed in his truck while Branscombe was let into the house by Klein. Shortly thereafter, Richter heard gunshots. He headed to-ward the house and heard more yelling and gunshots as he approached the front door. Richter saw Klein lying in the doorway to Johnson's bedroom, and found Branscombe "totally freaked out" standing in the middle of the bedroom holding a firearm. Branscombe told Richter that Johnson and Klein had fired at him and tried to kill him. Branscombe picked up the Mac-12 from the floor and told Richter that

Johnson or Klein had fired it and had tried to shoot him with it. Branscombe then ran outside and tried to start the truck. Richter panicked and ran back out to the truck. Richter and Branscombe drove away.

Soon after the shootings, Johnson made a 911 call to police. Before police arrived six minutes later, Johnson testified that he made a phone call to his girlfriend's father and took two trips through the house and into the yard to hide his marijuana plants. The police arrived at the house six minutes after Johnson's 911 call. Upon arrival, they encountered a "hysterical" Johnson, who had blood on his cheeks, shirt, hands and right shoulder. The police saw Klein lying on top of a sleeping bag on the living room couch, near death.

A subsequent investigation found two spent .32 casings in the bedroom where Johnson said he had been shot. The investigators found blood on the bed where Johnson said he had been shot, and a pool of blood in the doorway to Johnson's bedroom. Investigators determined that Klein had been shot twice, by a .22 and a .32 caliber bullet. They also found a spent .32 and a spent .22 casing in the living room near the couch where Klein was lying. Later, while searching Richter's residence, investigators found Johnson's gun safe haphazardly laying on its back. Investigators found a .380 casing in Richter's vehicle which they determined had been ejected from Johnson's Mac-12.

The weapons used to kill Klein and injure Johnson were never found, but investigators examined the bullets fired and casings ejected at the scene. The .22 bullet removed from Klein was a CCI

Stinger. The bullet had markings consistent with being ejected from a High Standard Sport King, although investigators could not rule out the possibility that the bullet had been fired from a different .22 caliber firearm. Investigators also found a CCI Stinger brand .22 caliber casing in Johnson's living room, near the couch where Klein was found by the police. The casing had markings consistent with (but not exclusive to) having been fired from a High Standard Sport King. While searching Richter's residence, investigators found a magazine loaded with CCI Stinger brand .22 cartridges. The magazine was identical in size and shape to High Standard magazines designed specifically for a Sport King. An investigator successfully fired a laboratory exemplar High Standard Sport King using the magazine found in Richter's residence.

A California Superior Court jury found Richter and Branscombe guilty of all charges after a trial lasting over three weeks. Following their convictions, Richter and Branscombe appealed to the California Court of Appeal, which affirmed the judgments of the trial court. Appellants filed a petition for review in the Supreme Court of California, which was denied. Appellants sought writs of habeas corpus in the California Supreme Court, which denied their petitions. Appellants timely petitioned for writs of habeas corpus in the United States District Court for the Eastern District of California, which denied the petitions. Appellants sought certificates of appealability from this court, which were granted.

II

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we may not grant a habeas corpus petition unless the state court decision "was contrary to, or involved an un-reasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[1] or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). When reviewing a state court's summary denial of a habeas petition, we "look through" the summary disposition to the last reasoned state court decision. *Plascencia v. Alameida*, 467 F.3d 1190, 1198 (9th Cir. 2006). When no state court has explained its reasoning on a particular claim, we conduct "an independent review of the record to determine whether the state court's decision was objectively unreasonable." *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006).

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[1] A state court decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that of the Supreme Court of the United States on a question of law, or decides the case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court decision is an "unreasonable application of" clearly established federal law if the state court identified the correct governing legal rule but unreasonably applied it to the facts at hand. *Id.* at 407.

We review a district court's decision to grant or deny a writ of habeas corpus de novo. *Lewis v. Mayle*, 391 F.3d 989, 995 (9th Cir. 2004). We review the district court's findings of fact for clear error. *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir. 1995).

III

Appellants argue that they were denied effective assistance of trial counsel as guaranteed by the Sixth Amendment. Under *Strickland*, petitioners claiming ineffective assistance of counsel must show both cause and prejudice to prevail on their claim. 466 U.S. at 687.

To show cause, petitioners must demonstrate that counsel's performance at trial was objectively unreasonable, i.e., "outside the wide range of professionally competent assistance." *Id.* at 688, 690. Judicial scrutiny of counsel's performance "must be highly deferential." *Id.* at 689. Counsel is "strongly presumed to have rendered adequate assistance." *Id.* at 690. Courts reviewing counsel's performance "evaluate the conduct from counsel's perspective at the time," to "eliminate the distorting effects of hindsight." *Id.* at 689. Strategic choices made by counsel after thorough investigation are "virtually unchallengeable." *Id.* at 690. A decision not to investigate must be assessed for reasonableness, applying a heavy measure of deference to counsel's judgments. *Id.* at 691.

To show prejudice, petitioners must demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

A

Appellants first argue that trial counsel rendered ineffective assistance under *Strickland* by (1) failing to develop and present testimony from firearms evidence experts, (2) failing to develop and present expert testimony to contradict the state's serology evidence and (3) failing to develop and present testimony from pathology experts. Appellants now submit declarations from experts in each of these three areas to support their assertion that they were prejudiced as a result of their counsel's failings.

We need not decide whether appellants' trial counsel acted unreasonably in failing to consult and present experts in firearms evidence, serology and pathology. Even assuming that trial counsels' failure to consult and present such experts was unreasonable, appellants do not show that such failure prejudiced their case.

1. **Firearms Evidence**

Appellants argue that their counsel rendered ineffective assistance by failing to develop and present expert testimony demonstrating that Johnson's Mac-12 firearm was prone to jamming.

At trial, the defense argued that Johnson attempted to shoot Branscombe with his Mac-12, but the weapon jammed because an empty shell failed to eject. Evidence that the Mac-12 had jammed would have bolstered the defense's case by providing a non-incriminating explanation for why Klein had been hit by both a .32 caliber and a .22 caliber bullet. According to the defense's theory at trial, after Johnson's Mac-12 jammed, he grabbed his .22 handgun. While trying to shoot Branscombe with the .22 as Branscombe struggled with Klein, Johnson missed and hit Klein instead. Branscombe then fired his .32 at both Klein and Johnson in self-defense. The theory also provides the defense with an explanation for why an empty shell from the Mac-12 was found in Richter's vehicle: the shell failed to eject when Johnson fired the handgun at Branscombe, but ejected when Richter and Branscombe examined it after leaving the scene of the shootings.

At trial, the State's criminalist, Robert Garbutt ("Garbutt"), testified that he test-fired Johnson's Mac-12 three times without a misfire. On cross-examination, Garbutt testified that modifications Johnson made to the Mac-12 could cause it to "malfunction or fail to fire." Garbutt also testified that he did not know whether these modifications would specifically cause a failure to eject the shell. Garbutt's testimony provided some support for the theory that Johnson accidentally shot Klein with a .22 bullet, but failed to explain why an empty shell, rather than an unfired bullet, was found in Richter's vehicle.

Appellants now submit a declaration of an expert in firearms evidence who would have testified that the type of alterations made to Johnson's Mac-

12 "can cause the gun to fail to eject a spent cartridge."

Appellants' counsel's failure to have such an expert testify at trial did not prejudice their case. Even had the jury heard the proffered expert's testimony that the Mac-12 could jam, there is no reasonable probability that the jury would have accepted appellants' theory that the Mac-12 did jam in this case. The proffered expert offers no opinion on the actual likelihood that such a modification would cause the weapon to jam. Garbutt, the State's own expert, admitted at trial that the modifications to Johnson's Mac-12 could possibly cause it to fail to fire, but found that the weapon successfully fired each of the three times that he tested it. To accept the appellants' theory, the jury would have had to find that (1) the Mac-12 malfunctioned when Johnson tried to fire it at Branscombe, even though it functioned normally when tested later, (2) the .22 caliber bullet in Klein's body came from a different firearm belonging to Johnson instead of one belonging to Richter, (3) the bullet from Johnson's .22 caliber hit Klein even though Johnson was attempting to shoot Branscombe, (4) Johnson would attempt to fire two different firearms at Branscombe, even though Branscombe had been a social guest in Johnson's house just hours before, (5) Klein would attack or threaten Branscombe in a manner justifying Branscombe's shooting of Klein in self-defense, even though Klein had been the person who let Branscombe into the house minutes earlier and (6) it is mere coincidence that investigators found a magazine in Richter's residence full of .22 CCI Stinger cartridges--the same type as the casing found in Johnson's living room.

The totality of the evidence presented at trial weighs strongly against appellants' theory that the Mac-12 jammed and that Branscombe fired at Klein in self-defense. There is no reasonable probability that the jury would have changed its verdict had they heard additional testimony stating that the Mac-12 could possibly malfunction in some manner.

2. Serology

Appellants argue that their counsel rendered ineffective assistance by failing to develop and present expert testimony regarding the source of the pool of blood in the doorway to Johnson's bedroom. If the pool of blood included blood from Klein, it would indicate that Klein had probably been killed near the doorway, instead of on the living room couch. This would contradict Johnson's testimony that Klein had been shot on the living room couch, and would instead support the defense's theory that Johnson had moved Klein to the couch after the shootings. This would also support the defense's theory that Klein had been shot by an errant bullet from Johnson's .22 caliber as Klein struggled with Branscombe in the vicinity of the bedroom door.

At trial, the State's serology expert testified that evidence taken from a sample of blood in the doorway confirmed that the blood tested came exclusively from Johnson. Appellants now submit the declarations of two serology experts stating that they "could not exclude" the possibility that the blood sample contained a mixture of Johnson's and Klein's blood.

There is no reasonable probability that the jury would have rendered a different verdict had defendants' proffered serology experts testified at trial. The serology experts' testimony, even if believed, would not significantly weaken the State's case. All the testimony says is that it is possible that the blood sample taken from the bedroom doorway might be a mixture of Klein and Johnson's blood, instead of being exclusively Johnson's blood. Because these expert reports do not foreclose the likelihood that the blood from the blood sample came exclusively from Johnson, they do not impeach Johnson's testimony that the blood came from him alone. The expert reports also do nothing to contradict the weight of the evidence presented at trial that supported the State's theory of the case.

3. Pathology

Appellants argue that their counsel rendered ineffective assistance by failing to consult a pathology expert and present testimony from such an expert at trial. Appellants argue that a pathology expert could have determined whether Johnson's wounds were severe enough for Johnson to have been the only source of the large pool of blood on the floor. Appellants new proffer a declaration from a pathology expert stating that "it is highly unlikely that the blood pool found in the doorway between the bedroom and living room was caused by Mr. Johnson's wounds." The expert's rationale for this conclusion is that Johnson was not bleeding enough, and did not remain in the doorway long enough, to be the sole contributor to the blood pool.

The lack of testimony from the pathology expert at trial did not prejudice the appellants. The reasons the expert provided in reaching his conclusion are flawed and are partially contradicted by the record.

First, the expert states that it is unlikely that Johnson had been bleeding significantly from his shoulder and cheek wounds. The expert bases his conclusion upon the fact that one of the policemen responding to Johnson's 911 call "did not notice that Mr. Johnson was injured until . . . several minutes after first contacting Mr. Johnson" inside the house. This statement of fact, while technically correct, distorts the record. The policeman in question, deputy Michael Wright ("Wright"), testified that, immediately upon entering the house, he noticed that Johnson had blood on him. Wright stated that he noticed blood "on both [of Johnson's] cheeks, blood covering his shirt, . . . blood on his hands, and . . . on his right shoulder." Wright did not confirm that Johnson's blood came from Johnson's own wounds until several minutes later. It appears from Wright's testimony that there was so much blood on and around Johnson's cheek that Wright did not notice Johnson had been shot in the cheek until Johnson wiped the blood off. Wright's testimony contradicts, rather than supports, the defense expert's conclusion that Johnson was not bleeding enough to be the sole contributor to the blood pool.

Second, the expert states that the amount of blood likely to result from a shoulder wound would likely be minimal. This statement fails to undermine the State's case. The statement does not address the quantity of blood that could be produced by a bullet wound in the cheek. The statement is speculative, and is contradicted by Wright's eyewitness testimony at trial.

Third, the expert states that it is unlikely Johnson was standing in the doorway long enough to create the pool of blood. This observation adds little beyond what a lay jury is qualified to observe. The expert does not provide any medical or scientific basis for his conclusion. There is not a reasonable probability that the expert's testimony, based upon the same observations that the jury was qualified to make, would have affected the jury's verdict.

4. Aggregate Impact of the Proffered Testimony

Strickland requires us to assess the aggregate impact of counsel's alleged failures when evaluating whether such alleged failures prejudiced the defendants. 466 U.S. at 695-96. The proffered testimony from the experts in firearms evidence, serology and pathology, considered in the aggregate, does not demonstrate prejudice. The testimony is not compelling enough to conclude that there is a reasonable probability that the jury would have reached a different verdict had they heard the testimony.

B

Appellants next argue that their counsel rendered ineffective assistance by failing to consult and present an expert on bloodstain pattern interpretation. We are unconvinced that trial counsels' failure to consult an expert on bloodstain pattern interpretation falls outside the wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690. Before trial, it was not unreasonable for counsel to fail to understand that an expert in bloodstain pattern interpretation--someone who could testify as to "blood into blood patterns" and "satellite drops" that result from blood falling from a certain height--would be valuable to his case. Counsel highly experienced in trying cases involving bloodstain evidence might well have understood the value of such an expert, but the Sixth Amendment does not guarantee defendants a right to highly experienced counsel. *See id.* at 688, 690.

Richter's defense counsel, Mark Axup ("Axup") stated that he was surprised by the State's decision at trial to call a detective as an expert on blood spatter evidence. The detective, Robert Bell ("Bell"), had investigated the homicide of Klein. Defense counsel had expected Bell to testify, but not as an expert in bloodstain pattern interpretation. The State made a last-minute decision to ask Bell to testify about the blood spatter evidence.

By the time Bell had testified, the trial was well underway and Axup later stated that defense counsel had little to no time to delve into the specifics of bloodstain pattern science. Given the circumstances, it was reasonable for counsel to not spend time attempting to locate and consult potential rebuttal experts, particularly since it was not clear that such an expert would disagree with the opinion of the State's expert. Defense counsel's failure to call an expert on bloodstain pattern interpretation did not fall below the low threshold of performance required by Strickland.

C

Richter argues that Axup provided ineffective assistance by failing to call several lay witnesses to testify at trial. Richter argues that the testimony of these witnesses would have supported Richter's claim that Johnson's gun safe was legitimately in Richter's residence at the time of the shootings. If the jury believed this claim, Richter and Branscombe could not have entered Johnson's house with the motive to steal the safe.

Axup called one witness at trial, Stephanie Edwards ("Edwards"), to support Richter's claim. Edwards testified that she saw the gun safe inside Richter's residence on several occasions, including two days before the shootings. Johnson testified at trial that he had kept his safe at Richter's residence for one or two weeks, but that he had moved the safe to his house at the end of November or the beginning of December. Scott Brown testified that he had helped Johnson move the safe from Richter's residence to Johnson's house during the first or second week of December.

The district court found that Axup made a tactical decision not to call the additional witnesses in question. This finding is not clearly erroneous. Axup testified in his 2004 deposition that he believed the State's cross-examination of these additional witnesses would harm their credibility, and that calling the witnesses would not be in the best interest of his client. The fact that, nearly nine years after trial, Axup could not recall the exact reasons why he believed that the witnesses were not credible does not mean that Axup had no basis for his decision at the time he made it. Axup had already called one witness who testified that the safe was in Richter's residence before the shootings. Axup's tactical decision not to call the other lay witnesses was not unreasonable. *See Strickland*, 466 U.S. at 690 (stating that strategic choices made by counsel after thorough investigation are "virtually unchallengeable").

D

Richter argues that Axup provided ineffective assistance of counsel by not investigating whether it was possible to retrieve a fragment of floorboard with a bullet hole in it. The floorboard came from Johnson's bedroom. Johnson testified that he made the hole when he accidentally fired his .22 caliber firearm while cleaning it a couple of weeks before the shootings. During trial, the prosecutor sent Investigator Brian Maloney ("Maloney") to investigate the bullet hole. Maloney photographed the hole with a measuring device next to it, and then cut out the piece of floorboard with the hole in it in an attempt to find the bullet. The floorboard fell into the crawl space beneath the house. Maloney testified at trial that the crawl space was inaccessible, and therefore he could not retrieve the floorboard. Maloney testified that he believed the hole was consistent with the size of a .22 caliber bullet.

After trial, Richter's father discovered that the crawl space was accessible. He retrieved the floorboard and gave it to Axup, who gave it to a firearms evidence expert, James Aiello ("Aiello"), for testing. Aiello determined that the hole was probably caused by a .380 caliber firearm, rather than a .22

caliber. This conclusion, if known at trial, would have given some support to the defense's theory that Johnson fired the .380 caliber Mac-12 at Branscombe on the night of the shooting. It also would have contradicted Johnson's testimony that he created the hole while cleaning his .22 caliber.

Axup's decision not to attempt to recover the floorboard was reasonable given the circumstances. Maloney testified under oath at trial that the floorboard was inaccessible, and Axup had no reason to disbelieve him. Given Maloney's testimony that the hole was consistent in size with one created by a .22 caliber bullet, Axup could reasonably believe that, even were it possible to retrieve the floorboard, the evidence would be inculpatory, not exculpatory. Further, Maloney did not cut out the floorboard until a week after the start of trial. Considering the considerable time pressures during this trial and Maloney's testimony that the floorboard was inaccessible, Axup's decision not to search for the floorboard was reasonable.

IV

Appellants argue that the prosecution suppressed exculpatory evidence at trial in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Appellants allege that the *Brady* violation occurred when Maloney lost the floorboard containing the bullet hole in the crawl space and incorrectly testified that there was no possible way to retrieve it.

It is well-established under *Brady* and its progeny that the State violates due process when it suppresses or fails to disclose material exculpatory evidence. *See Illinois v. Fisher*, 540 U.S. 544, 547, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004); *Brady*, 373 U.S. at 87. The Supreme Court limited *Brady*'s reach in *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) and *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). *Trombetta* holds that, for the *Brady* standard to apply, "evidence must . . . possess an exculpatory value that was apparent *before* the evidence was destroyed." 467 U.S. at 489 (emphasis added); *see also Youngblood*, 488 U.S. at 56 n.*. *Youngblood* holds that the State's failure to preserve "potentially useful" evidence does not constitute a due process violation unless the defendant can show bad faith on the part of the police. 488 U.S. at 58; *see also United States v. Estrada*, 453 F.3d 1208, 1212 (9th Cir. 2006) (drawing a distinction between "potentially exculpatory" and "apparently exculpatory" evidence).

Trombetta and *Youngblood* both involve evidence that the police permanently lost or destroyed before its inculpatory or exculpatory value could be conclusively determined. In both cases, the police had no reason to believe that the evidence would be exculpatory at the time the evidence was destroyed.[2] Here, similar to Trombetta and Youngblood, Maloney and the prosecutor did not believe that the floorboard would be exculpatory evidence at the time that it fell into the crawl space beneath the house. In contrast to Trombetta and Youngblood, however, the evidence at issue here was recovered after trial and was found to have exculpatory value.

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[2] In *Trombetta*, the Supreme Court determined that the State did not violate due process when it failed to preserve samples of respondents' breath in cases where respondents were convicted of drunk driving. 467 U.S. at 491. The respondents claimed that, had the breath samples been preserved, they would have been able to impeach the incriminating test results. *Id.* at 483. The Court held in *Youngblood* that the failure of the police to preserve semen on clothing that could have potentially exculpated the defendant of sexual assault charges did not violate due process. 488 U.S. at 58. The defendant alleged that he had been misidentified as the perpetrator. *Id.* at 54. The Court held that, absent a showing of bad faith, police do not violate due process when they fail to disclose or preserve "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 57.

We have not yet specifically addressed whether the rules announced by the Supreme Court in *Trombetta* and *Youngblood* apply in the unusual factual situation presented here. By their own terms, *Trombetta* and *Youngblood* apply in situations where, as here, the police did not believe evidence to have exculpatory value when it was lost or misplaced, even if the evidence is later recovered and determined to be exculpatory.

The Supreme Court made clear in *Trombetta* and *Youngblood* that the dispositive issue for due process purposes is the state of mind of police or prosecutors at the time the evidence is lost or destroyed. *See Youngblood*, 488 U.S. at 56 n.*; *Trombetta*, 467 U.S. at 488-89.[3] The Supreme Court reached this conclusion based upon their stated "unwillingness to read the . . . Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58 (citation omitted). The Supreme Court did not approve a constitutional standard where acceptable management of evidence by law enforcement could retroactively be found unconstitutional if, after trial and conviction, a defendant shows that the evidence would have been exculpatory. The post-trial retrieval of the floorboard does not entitle appellants to a retroactive determination that Maloney violated appellants' due process rights by inadvertently losing or misplacing the evidence.

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[3] In *Youngblood*, for example, the Supreme Court focused specifically on the police officers' state of mind at the time the evidence was lost: "Here, respondent has not shown that the police knew the semen samples would have exculpated him *when they failed to . . . refrigerate the boy's clothing*; this evidence was simply an avenue of investigation that might have led in any number of directions." 488 U.S. at 56 n.* (emphasis added).

Applying the *Trombetta-Youngblood* rule here, we find no evidence in the record of bad faith on the part of Maloney or the prosecution. Maloney testified that he believed the floorboard to be in an inaccessible location after he cut it out of the floor in Johnson's residence. The prosecution fully disclosed the nature and location of the evidence. At worst, Maloney's actions could be described as negligent. Appellants were not denied due process of law, and the state court's denial of habeas relief on this ground was not an unreasonable application of federal law.

V

Branscombe argues that his trial counsel, Thomas Dixon ("Dixon"), failed to subject the prosecution's case to meaningful adversarial testing in violation of *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). In *Cronic*, the Supreme Court identified three situations where the Court does not require a showing of prejudice to establish a violation of the Sixth Amendment right to counsel. *See id.* at 658-61. These situations include (1) where there has been a complete denial of counsel at a critical stage of trial, (2) where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing" and (3) where "surrounding circumstances made it . . . unlikely that any lawyer could provide effective assistance." *Id.* at 659-61. The Supreme Court later emphasized that *Cronic*'s exception for failing to test the prosecution's case applies only when the attorney's failure to do so is complete. *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). An attorney's failure to oppose the prosecution at specific points during the trial does not rise to the level of a *Cronic* violation. *See id.* Rather, the attorney's failure must implicate the proceeding as a whole. *United States v. Thomas*, 417 F.3d 1053, 1057 (9th Cir. 2005) (citing *Bell*, 535 U.S. at 697).

Branscombe argues that Dixon's lack of investigation and preparation for trial resulted in a failure to subject the prosecution's case to meaningful adversarial testing. We are not persuaded that Dixon's lackluster preparation for trial resulted in a complete failure to contest the prosecution's case. To the contrary, the record shows that Dixon engaged in adversarial testing on numerous occasions throughout trial. As the district court and the state appellate court noted, Dixon cross examined most of the witnesses, successfully moved to suppress statements and strike testimony, successfully moved to exclude evidence and had a witness perform a demonstration. Dixon also asked several questions of Richter at trial to support the theory that Branscombe had returned to Johnson's house to give Johnson a firearm, and had fired the weapon in self-defense. Dixon's participation at trial demonstrates that he did not entirely fail to subject the prosecution's case to meaningful adversarial testing.[4]

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[4] We agree with the State that Branscombe's *Cronic* claim is unexhausted. Branscombe did not present to the California state courts the "substantial equivalent" of the claim presented in federal court. *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007). The factual basis for Branscombe's current *Cronic* claim rests primarily upon new evidence that the California state courts did not have the opportunity to consider on direct review. The State did not expressly waive its exhaustion defense before the district court. The State may therefore raise the defense here, even though the district court did not address the exhaustion issue. See 28 U.S.C. § 2254(b)(3). We deny Branscombe's unexhausted petition on the merits. *See* 28 U.S.C. § 2254(b)(2). For the reasons stated above, we find it perfectly clear that Branscombe does not raise even a colorable *Cronic* claim. *See Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005).

VI

Richter alleges that the trial court violated his Eighth and Fourteenth Amendment rights by providing an incorrect or inaccurate answer to a request for clarification that the jury submitted to the trial court during deliberations. The jury requested the following clarification from the trial court: "If a defendant is found to have aided & abetted in [robbery], is he guilty of all charges (or can you find him guilty of lesser charges) as found for the other defendant." The trial court responded "yes" (*i.e.*, that the defendant is guilty of all charges), over defense counsel's objections. Richter argues that this response was an incorrect statement of California law, that this error violated Richter's rights to a jury trial and to due process of law and that a writ of habeas corpus must issue as a result.

To obtain habeas relief following an erroneous response to a jury's request for clarification, a petitioner must show that (1) the response was an incorrect or inaccurate application of state law, (2) constitutional error resulted and (3) the error was not harmless. *See Morris v. Woodford*, 273 F.3d 826, 833 (9th Cir. 2001). To determine whether constitutional error occurred, we ask "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (internal quotations and citation omitted). In other words, constitutional error occurs when (1) there is a reasonable likelihood that the jury understood the trial judge's response to a request for clarification as stating a certain rule of law, (2) that rule, as potentially understood by the jury, was incorrect or inaccurate and (3) the rule, so understood, was unconstitutional as applied to the defendant. *See Calderon v. Coleman*, 525 U.S. 141, 147, 119 S. Ct. 500, 142 L. Ed. 2d 521 (1998). In attempting to determine what the jury understood the response to mean, the response "may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (internal quotations and citation omitted).

To determine whether the error was harmless, we consider whether the error had a "substantial and injurious effect or influence on the jury's verdict." *Calderon*, 525 U.S. at 147. "If we are in grave doubt as to whether the error had such an effect, the petitioner is entitled to the writ." *Morris v. Woodford*, 273 F.3d 826, 833 (9th Cir. 2001) (internal quotations and citation omitted).

The trial court's response to the jury's request for clarification could be interpreted as an inaccurate statement of California law. The jury's request and the trial court's answer (referred to hereafter as the "colloquy") created an ambiguity. The most natural reading of the colloquy is that it correctly states California's felony murder rule: when a defendant aids and abets a robbery, and someone is killed during the robbery, the defendant is guilty of both robbery and murder, even if his accomplice does the killing. *See People v. Washington*, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 134 (Cal. 1965). But the colloquy goes further. It permits the jury to conclude that a defendant who aids and abets a robbery-murder must be found guilty of robbery and murder even if he does not begin to aid or abet the robbery until after the murder has already occurred. This interpretation of the colloquy results in an incorrect statement of California law. California permits a defendant who aids and abets a robbery to be found guilty of felony murder only if he began his aiding and abetting before the commission of the killing. *See*

People v. Pulido, 15 Cal. 4th 713, 63 Cal. Rptr. 2d 625, 936 P.2d 1235, 1236 (Cal. 1997).

Constitutional error did not result because it is not reasonably likely that the jury interpreted the colloquy in a manner that misstates the law. In phrasing the request for clarification the way they did, it is unlikely that the jury was attempting to determine whether someone who began to aid and abet a robbery only after a murder had been committed must be found guilty of the murder. If the jury were intending to pose such a question to the judge, they likely would have done so in a more direct manner. The manner in which the question was phrased strongly suggests that the jury was asking for a clarification of the felony murder rule for accomplices, as described above. Given the question that the jury was posing to the trial judge, it is not reasonably likely that the jury understood the response to mean anything more than a straightforward and accurate statement of California's felony murder rule.

Even if the trial court did commit constitutional error, the error was harmless. For the error to have an injurious effect or influence in determining the jury's verdict, the jury must have believed that Branscombe committed robbery and murdered Klein, but that Richter did not begin to aid or abet the robbery until after the murder occurred. To believe this, the jury would have to have found, based on the facts presented to them at trial, that (1) Richter had no intention of robbing Johnson (or of helping Branscombe rob Johnson) when he and Branscombe drove to Johnson's house around 4:00 that morning, (2) Branscombe, unbeknownst to

Richter, decided to rob Johnson and shoot Klein, (3) after Klein was shot, Richter decided to aid and abet Branscombe in committing the robbery. Neither the State nor the defendants argued such a theory of the case. Such a conclusion would go against significant evidence presented at trial, including the evidence showing that Richter owned the same type of bullets used to shoot Klein. This conclusion would also be inconsistent with the testimony of both Richter and Johnson. It is unlikely that any member of the jury arrived at this conclusion.

Because the trial court did not commit constitutional error, and because any error would have been harmless, Richter is not entitled to a writ of habeas corpus on this claim.

VII

We affirm the district court's denial of Richter and Branscombe's petitions for writs of habeas corpus.

AFFIRMED.

578 F.3d 944; 2009 U.S. App. LEXIS 17821

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSHUA RICHTER, *Petitioner-Appellant,*	No. 06-15614 D.C. No. CV-01-00643 JKS
v.	
R. Q. HICKMAN, Warden; CAL A. TERHUNE; ERNIE ROE, *Respondents-Appellees.*	OPINION

Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-01-00643-JKS. James K. Singleton, Senior District Judge, Presiding.

Argued and Submitted
December 17, 2008 -- Pasadena, California

Filed August 10, 2009

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Barry G. Silverman, Kim McLane Wardlaw, Raymond C. Fisher, Richard A. Paez, Jay S. Bybee, Milan D. Smith, Jr. and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Bybee.

COUNSEL

Cliff Gardner, Oakland, California, for petitioner-appellant, Joshua Richter.

Harry Joseph Colombo, Deputy Attorney General, John G. McLean, Supervising Deputy Attorney General, and Mark Anthony Johnson, Deputy Attorney General, Sacramento, California, for the respondents-appellees.

OPINION

[946] REINHARDT, Circuit Judge:

To . . . not prepare is the greatest of crimes; to be prepared beforehand for any contingency is the greatest of virtues.

-- Sun Tzu, *The Art of War* 83

(Samuel B. Griffith trans., Oxford University Press 1963)

At the heart of an effective defense is an adequate investigation. Without sufficient investigation, a defense attorney, no matter how intelligent or persuasive in court, renders deficient performance and jeopardizes his client's defense.

Here, counsel did not meet his basic obligation to his client. Much was riding on his performance in this case: his client, Joshua Richter, was accused of murder, among other charges, and faced life imprisonment without parole. Yet, counsel failed to undertake the most elementary task that a responsible defense attorney would perform in a case of this nature, and consequently provided representation that fell well below a reasonable standard of professional competence. Although it was apparent that an issue critical to the outcome could best be resolved through the presentation of forensic evidence, counsel failed at each stage of the case to consult with a forensic expert of any type and thus failed to conduct the rudimentary investigation necessary in order to (1) decide upon the nature of the defense to be presented, (2) determine before trial what evidence he should offer, (3) prepare in advance how to counter damaging expert testimony that might be introduced by the prosecution, and (4) effectively cross-examine and rebut the prosecution's expert witnesses once they did testify during the course of the trial. There was in fact no strategic reason for counsel's failure to do so. As it turned out, these repeated failures **[947]** to investigate were prejudicial: available forensic testimony would have contradicted the prosecution's explanation of the events that transpired and would have strongly supported the defense's version.

We conclude that, singly and collectively, counsel's failures rise to the level of ineffective assistance of counsel under the Sixth Amendment. There is nothing novel about our holding. Rather, we arrive at the only reasonable conclusion that can be reached, given the facts of the case and the well-established applicable law. We therefore reverse the district court and remand with directions to grant the writ of habeas corpus.

I.

On December 18, 1995, a California jury convicted Joshua Richter ("Richter") and Christian Branscombe ("Branscombe") of the murder of Patrick Klein ("Klein") and attempted murder of Joshua "Gunner" Johnson ("Johnson"), as well as of burglary and robbery. Both young men were sentenced to life in prison without the possibility of parole. Richter and Branscombe were each twenty at the time of the offense and twenty-one years old at the time of conviction.

Almost precisely a year prior to the date of their conviction, on the evening of December 19, 1994, Richter and Branscombe drove to the Sacramento home of Johnson, a close friend of Richter's and an acquaintance of Branscombe's. The two young men had earlier completed their final day of work at a nearby Christmas tree lot, and Richter's boss had paid him approximately $800 in cash. He had also given him the wages owed to Johnson's housemate, Tony,[1] a friend and co-worker who had failed to show up for work that day. Richter and Branscombe drove to Johnson's house so that Richter could pay Johnson some money he owed him out of his newly received earnings, deliver Tony's wages, and buy some "head stash" from Johnson, who was a major marijuana dealer.

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[1] The record reflects uncertainty regarding Tony's last name.

When Richter and Branscombe arrived at the house, no one was home. They waited in the driveway, in Richter's girlfriend's car, until Johnson returned shortly thereafter, accompanied by Klein and another friend. Johnson did not immediately recognize Richter's girlfriend's car, and approached it with his .380 **[948]** caliber M-12 handgun loaded and drawn. Upon seeing the defendants, Johnson put the weapon away. Johnson, Klein, Richter, and Branscombe went into the house, where they socialized for several hours. While they talked and Johnson, Klein, and Richter smoked marijuana, Branscombe cleaned a .32 caliber handgun that he had recently acquired from Johnson as a means of protection when he worked late nights at the tree lot. Richter and Branscombe left Johnson's residence shortly after 2:30 a.m. Klein decided to spend the night.

At trial, Richter and the State of California ("the State") presented dramatically different accounts of the ensuing events. According to the State, after Richter and Branscombe left, Johnson went to sleep in his bedroom and Klein lay down on the couch in the living room. Johnson awoke somewhere between 4:00 and 5:00 in the morning to find Richter and Branscombe in his bedroom, in the act of stealing his gunsafe, which he said was located in his bedroom closet. Branscombe then twice shot Johnson, who fell back wounded onto the bed. Soon thereafter, Johnson heard gunshots coming from the living room. After Richter and Branscombe left the house, Johnson got out of bed, found Klein lying on the living room couch bleeding, and discovered that his gun-safe, his .380 caliber M-12, and a hip sack that contained $6000 in cash were all missing.

Richter told a markedly different story. He testified that after leaving Johnson's house around 2:30, he and Branscombe decided to go back to the Christmas tree lot where they had worked. Their boss had instructed them to clear out their belongings from the trailer on the property before morning, and, not wanting to go to sleep for a few hours only to wake up early to finish the job, he and Branscombe got his pick-up truck and cleared out the trailer, including the belongings of Johnson's housemate, Tony. The two young men then returned to Johnson's residence around 4:30 a.m., in order to see whether Tony had come home and to drop off his belongings, along with his pay. Branscombe also intended to return the .32 caliber handgun to Johnson if he was still awake. Richter stayed in his truck in Johnson's driveway, smoking a cigarette, while Branscombe knocked on the door and was let into the house by Klein.

Shortly thereafter, Richter heard gunshots. He headed toward the house and heard yelling and more gunshots as he approached the front door. He found Klein lying in the door-way to Johnson's bedroom, saw Johnson lying twisted on the bed, and found Branscombe "totally freaked out," standing in the middle of the bedroom holding a firearm, and shouting, "They tried to kill me." According to the defense, Johnson, who had earlier been drinking and smoking marijuana, had drawn his .380 caliber M-12 and fired at Branscombe when he entered the room. After firing one bullet, the gun -- which Johnson had attempted to modify from a semi-automatic to a fully automatic -- jammed, and Johnson threw it down. He then took out a second handgun -- apparently a .22

caliber -- that he kept under his mattress and shot at Branscombe, but hit Klein instead. Branscombe then fired three shots with the .32 caliber handgun and hit both Klein and Johnson.[2] After Richter arrived inside the house, Branscombe picked up Johnson's M-12 from the floor and ran outside to try to start the truck. Richter panicked and ran back out to the truck as well, and the two young men drove away.

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[2] The dissent suggests the defense theory rested on the unlikely scenario that Klein attacked Branscombe "immediately" after letting him into the house. See Dissent at 10721, 10754-55. This is incorrect. The defense theory was that Johnson (not Klein) initiated the attack from inside the bedroom when Branscombe approached the bedroom door -- which is not implausible if Johnson, a major drug dealer, impaired by drugs and alcohol, was startled awake and saw a figure he did not recognize in his bedroom doorway, especially given his demonstrated willingness to use his M-12 earlier in the evening.

Sometime after the shootings, Johnson made a 911 call to the police.[3] Johnson testified that, before the police arrived six minutes later, he made a phone call to his girlfriend's father and took two trips through the house and into the yard to hide his marijuana plants. When the police arrived, they encountered a "hysterical" Johnson, who had blood on his cheeks, shirt, hands and right shoulder. The police found Klein lying on top of a sleeping bag on the living room couch, near death.

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[3] The defense contended that Johnson delayed for approximately half an hour before calling the police -- time enough to manipulate the evidence at the scene and hide the .22 caliber firearm.

The initial investigation of the scene uncovered two spent .32 casings in the bedroom, as well as blood on the bed where Johnson said he had been shot. There was a large pool of blood in the doorway to Johnson's bedroom, where Richter testified that Klein had been shot. The pool had been disturbed by a foot stomp or **[949]** some other external force. Investigators determined that Klein had been shot twice, by a .22 and a .32 caliber bullet. They found a spent .32 and a spent .22 casing in the living room near the couch where Klein was lying, although the prosecution's expert testified at trial that it is impossible to determine with certainty how casings end up where they do.

A significant amount of blood was found throughout the house. Investigators photographed and videotaped the scene, collected a few blood swabs, and took some fingerprints, but primarily determined that the scene appeared to be consistent with Johnson's account of what had happened and did not pursue an in-depth forensic investigation. The police took a sample of blood from the door molding above the pool of blood in the doorway, but not from the pool itself. They did not perform any blood typing or blood spatter analysis and did not attempt to discover whose blood formed the pool in the doorway until the middle of the trial, nearly a year later, in the belief that the case was sufficient without such evidence.

Richter testified that, upon fleeing the scene in a panic, he stopped briefly at his girlfriend's house, while Branscombe waited outside in the truck, and after a conversation about Johnson and Klein drove back to Johnson's house to check on his friends. He and Branscombe saw two sheriff's cars in the driveway, however, and decided not to stop. Instead, they drove out to a remote area, the Yolo bypass, where Richter, Branscombe, Johnson, and their friends frequently went to hang out and shoot their guns. There, they threw away the .380- and .32-caliber weapons and discussed what to do next. They slept for awhile. When they awakened, they discovered that their truck was stuck in the mud, and after obtaining assistance to get it moving, they eventually returned to town and were arrested shortly thereafter, a day and a half after the shooting.

Following his arrest, Richter, his attorney, and a police detective went out to the Yolo bypass in an attempt to recover the discarded weapons. They could not locate the firearms, but did find a $100 bill in the vicinity. Later, Richter's lawyer returned to a nearby area and managed to recover the .380 M-12, which he then turned over to the police. Investigators also found a spent .380 casing in Richter's truck which they determined had been ejected from Johnson's M-12. Richter testified that, driving to the Yolo bypass, Branscombe had dislodged a shell that had been jammed in the receiver by jerking on the lever. The weapons used to kill Klein and injure Johnson were never found.

In the aftermath of the shooting, Johnson told the police that his missing gun-safe would be at Richter's house. Sure enough, while searching Richter's residence, investigators found Johnson's gun-safe lying on a pile of assorted items in Richter's garage. According to the defense, the safe had been at Richter's house with Johnson's permission all along; Johnson frequently stored some of his belongings, including scuba gear and firearms, with Richter. Johnson admitted that he had stored the safe at Richter's residence but stated that he and a friend had moved it to Johnson's house a couple of weeks before the shooting. Although Richter denied owning a handgun, investigators also found .22 caliber cartridges and a loaded magazine in Richter's garage. The cartridges were consistent with the .22 caliber bullet found in Klein's body, as well as with the casing found in Johnson's living room. In closing argument, Richter's lawyer argued that the cartridges were Johnson's, and that Johnson was storing the cartridges there along with the rest of his belongings.

[950] Johnson owned a number of firearms, including two AK-47 assault rifles and a .22 caliber shotgun. Neither Richter nor Johnson admitted to owning a .22 caliber handgun, and Richter denied owning any handguns at all. He testified at trial, however, that Johnson owned, and had previously shown him, a .22 caliber pistol.

After the trial began, the State conducted two significant forensic tests that it had not previously performed and presented related testimony at trial. First, the State asked Detective Robert Bell to perform a blood spatter analysis of the crime scene, based on photographs that had been taken shortly after the shootings. Bell testified as an expert in blood spatter that it was unlikely that Klein could have been killed in the doorway and carried to the couch, primarily because of blood flow patterns on his head and the lack of smearing around the blood pool.[4]

This suggested that Johnson would have had to have lifted Klein straight up. Bell acknowledged, however, that although there was some evidence of high velocity blood spatter near the couch, suggesting a shooting in that location, there was no visible blood spatter on the sleeping bag or on the couch itself, and no blood spatter that corresponded with two shots being fired. Second, the State asked Jill Spriggs, a serologist, to determine the blood type of a sample collected from spatter four inches above the pool of blood in the bedroom doorway, and to compare that sample to Johnson's and Klein's blood. Spriggs testified, based on the PGM subtyping of the samples, that none of the blood was Klein's. The defense offered no expert testimony in response.

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[4] The State's blood spatter expert drew his conclusions from an analysis of photographs, nearly a year after the events in question. He explained, "I did not see the victim. He was transported prior to my arrival, and all I have had is these photos which are lacking. I mean, they are dark and not clear, but I was not able to see in viewing the photos anything consistent with [Klein falling to the floor] after having been asked to look at them." In analyzing the blood flow patterns on Klein's face, Bell admittedly could not see the right side of Klein's head.

After a trial lasting over three weeks, a California Superior Court jury found Richter and Branscombe guilty of all charges. Following their convictions, Richter and Branscombe appealed to the California Court of Appeal, which affirmed the judgments of the trial court. Richter and Branscombe next filed a petition for review in the California Supreme Court, which was summarily denied, and then sought writs of habeas corpus in the California

Supreme Court, which were also summarily denied. Richter and Branscombe timely petitioned for writs of habeas corpus in the United States District Court for the Eastern District of California, which rejected the petitions. They then sought certificates of appealability from this court, which we granted. A panel of our court affirmed the district court's denial of Richter's petition. We now sit en banc to rehear the appeal, having granted his petition for rehearing en banc.

II.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas relief only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court decision is "contrary to" clearly established federal law "if the state court . . . arrives at a conclusion opposite **[951]** to that [of the Supreme Court] on a question of law," or decides the case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court decision is an "unreasonable application of" clearly established federal law "if the state court identifie[d] the correct governing legal rule . . . but unreasonably applie[d] it to the facts" at hand. *Id.* at 407. For a state court decision to be an unreasonable application of "clearly established Federal law" under § 2254(d)(1), the

Supreme Court's prior decisions must provide a "governing legal principle or principles" applicable to the issue before the state court. *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Circuit precedent is relevant under AEDPA when it illuminates whether a state court unreasonably applied a general legal standard announced by the Supreme Court. See *Crater v. Galaza*, 491 F.3d 1119, 1126 n.8 (9th Cir. 2007).

When reviewing a state court's summary denial of a habeas petition, we "look through" the summary disposition to the last reasoned state court decision. *Plascencia v. Alameida*, 467 F.3d 1190, 1198 (9th Cir. 2006). Where, as here, no state court has explained its reasoning on a particular claim, we conduct an "independent review of the record to determine whether the state court's decision was objectively unreasonable." *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006).[5] We review a district court's decision to grant or deny a writ of habeas corpus de novo, *Lewis v. Mayle*, 391 F.3d 989, 995 (9th Cir. 2004), and the district court's findings of fact for clear error, *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir. 1995).

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[5] Here, the California Supreme Court denied Richter's habeas petition in one sentence, without providing any reasoning for its decision. No other state court commented on Richter's claim that counsel provided ineffective assistance by failing to investigate the source of the pool of blood, consult expert witnesses, or call any such witnesses who could testify as to its source.

Because we would grant the writ whether we reviewed the state court's decision de novo or for objective unreasonableness, we apply the stricter unreasonableness standard. Thus, we need not determine whether or when an unreasoned state court decision warrants AEDPA deference.

As we conduct our independent review of the record, we apply the Supreme Court law on ineffective assistance of counsel claims -- in particular, that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also id. at 688 ("More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective . . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). Under AEDPA, we apply *Strickland* to each individual case, irrespective of whether the precise fact pattern at issue has been considered previously by the Supreme Court. *See Williams*, 529 U.S. at 391 ("That the *Strickland* test 'of necessity requires a case-by-case examination of the evidence' . . . obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court.")."[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420, 173 **[952]** L. Ed. 2d 251 (2009) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). We do not, however, afford the state courts a blank check to determine, at their whim, whether an attorney's conduct was reasonable or unreasonable:

> That the standard is stated in general terms does not mean the application was

> reasonable. AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.

Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842, 2858, 168 L. Ed. 2d 662 (2007) (citations and internal quotation marks omitted). Where counsel's failure to investigate was both objectively unreasonable and prejudicial, and where the state court acted unreasonably in finding to the contrary, we will grant a petition for habeas corpus.

III.

Richter challenges his conviction primarily on the ground that he received ineffective assistance of counsel and thus was deprived of his rights under the Sixth Amendment. *Strickland* sets forth the well-established two-part standard for ineffective assistance of counsel claims. "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. To be "deficient," counsel's performance at trial must be objectively unreasonable -- it must be "outside the wide range of professionally competent assistance." *Id.* at 688, 690. We "evaluate the conduct from counsel's perspective at the time" to "eliminate the distorting effects of hindsight," and we are "highly deferential" in judging counsel's performance, affording counsel a strong presumption of adequacy. *Id.* at 689.

Next, "the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. We find prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is clear . . . that [Richter] *need not* show that [counsel's] deficient conduct more likely than not altered the outcome in the case. This 'preponderance' standard was explicitly rejected in *Strickland*." *Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir. 1994) (citing *Strickland*, 466 U.S. at 693) (emphasis in original).

Finally, because AEDPA applies, if we determine that the defendant did not receive effective assistance of counsel, we must decide whether the state court's decision that he did constitutes an unreasonable application of clearly established Supreme Court law. 28 U.S.C. § 2254(d).

Richter contends that his counsel rendered ineffective assistance under *Strickland* by (1) failing to investigate and present expert testimony on blood spatter, serology, and pathology in order to explain the source of the pool of blood by the door-way; (2) failing to investigate the accessibility of the floorboard that the state investigator dropped into the crawl space below the house, and to present expert ballistics testimony that the bullet hole was made by a .380-caliber, rather than a .22-caliber, bullet; (3) failing to investigate and present expert testimony on ballistics to show that Johnson's .380 M-12 might have jammed; and (4) failing to **[953]** investigate and present testimony from lay witnesses. On state and federal habeas review, Richter submitted declarations from experts in blood spatter, serology, pathology, and ballistics, as well as from lay witnesses, to support his ineffective assistance claim.

We consider here only Richter's first argument – counsel's failure to investigate and present ex-pert testimony on blood evidence -- and conclude that he is correct. Even affording counsel the "strong presumption that [his] conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, we hold that there was no reasonable basis for his failure, before deciding on the nature of his defense, as well as while preparing for trial and during its course, to investigate the availability of forensic evidence that might corroborate Richter's testimony regarding the source of the pool of blood by the bedroom doorway. We so conclude, fully aware, as counsel should have been, that establishing the source, or at the least raising substantial doubts as to the prosecution's evidence on that point, was critical to the success of Richter's defense. Finally, we conclude that Richter was prejudiced by counsel's deficient representation in this respect, and thus did not receive effective assistance of counsel. The state court holding to the contrary constitutes an objectively unreasonable application of *Strickland*. We therefore reverse the district court's denial of the writ of habeas corpus.

A. Deficient Performance

As we have explained, a central dispute between the prosecution and the defense was Klein's location when he was shot. Investigation of the crime scene revealed a pool of blood in the doorway between the bedroom and the living room. The State claimed that Klein was shot as he lay on the couch in the living room and that the pool of blood in the doorway was Johnson's: that the pool formed as Johnson stood, dripping blood on the floor, waiting for the police to arrive. Richter, however, although acknowledging that some of the blood might have been Johnson's, insisted that it was at least partly Klein's, as Klein had been shot near the doorway in a shootout and not in cold blood on the couch. This factual dispute was, indeed, the single most critical issue in the case, at least from the standpoint of the defense.[6] If the jury was persuaded beyond a reasonable doubt that Klein was killed on the couch, the defense would have no hope of succeeding. If, however, the jury believed that there was a reasonable possibility that Klein had been shot in the doorway, as Richter testified, Johnson's version of the events -- and the prosecution's case -- would be severely undermined, and the shootout version offered by the defense would in all likelihood preclude a verdict of guilty. Under the circumstances, any competent defense counsel would have immediately recognized the critical importance of investigating the source of the pool of blood, and of attempting to obtain forensic evidence that would support Richter's account of the fatal **[954]** evening's occurrences. In fact, knowing that forensic evidence could provide support for either version of the events, and could corroborate or discredit his client's account, competent counsel would have consulted with an expert in blood evidence before settling upon his theory of the case and his decision to attempt, unsuccessfully, to turn it into a pure credibility contest. This is indeed precisely what *Strickland* requires.[7]

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[6] Although later stating that the defense's "entire case" depended on the plausibility of Johnson shooting at Branscombe during a struggle, Dissent at 10752, the dissent takes issue with our conclusion that the dispute over Klein's location when shot was the most important issue for the defense. *See* Dissent at 10710-11. We must disagree; there can be no doubt of its importance to Richter's account of self-defense. Blood evidence, which obviously might prove or disprove the location of the shooting, was therefore critical. That the State, which was unaware of Richter's version of the events before trial began, did not immediately understand the significance of the pool of blood in the bedroom doorway has no bearing upon the relative importance of the source of the pool to the defense's theory of the case.

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[7] Counsel need not, of course, "consult an expert on every conceivable evidentiary issue." Dissent at 10711. Nor must he adopt a "scorched-earth" investigative strategy. *Id.* at 10712, 10745 n.15. In the circumstances of this particular case, however, counsel was obligated to consult with forensic experts on blood evidence in order to provide adequate representation to his client. The point here is that the pool of blood was critical to the defense, and that counsel therefore was required to investigate the availability of forensic evidence that might prove its source -- not only "because it was possible that the State might introduce similar experts at trial," *id.* at 10712, but more important, because counsel had an independent obligation to develop his client's case and to present as strong a defense as possible.

Despite the centrality of the source of the pool of blood to Richter's defense, counsel consulted no forensic expert as to what type of expert testimony or evidence might be available, conducted no forensic investigation whatsoever with respect to the blood pool, and in the end, as a result, offered no expert testimony to explain its source. Nor did he seek to obtain a forensic consultant who could assist him in evaluating the testimony of the prosecution's experts or guide him in developing effective cross-examination of those witnesses. Other than a conversation in the hallway with the prosecution's serology expert in the midst of trial, at no point either before or during the trial did defense counsel consult any expert on blood evidence in an attempt to determine the nature of the defense that could be presented or to discover how expert testimony might be used to bolster his client's case or undermine the prosecution's. He made no effort to find or develop expert testimony on such important questions as the blood type of the person or persons whose blood formed the pool in the doorway; whether Johnson's injuries were severe enough to create such a large pool of blood; and, most important, whether the blood spatter around the pool of blood indicated how or from whom the blood had been deposited in the pool.

Counsel's failure to consult any forensic expert constituted a threefold abrogation of his duty under *Strickland*. Counsel's first failing lay in his inadequate investigation prior to settling on a trial strategy; his second, in failing to conduct the necessary investigation before trial to determine what forensic evidence might be available for him to introduce or how expert testimony might support the theory he had chosen; and his third, in failing to consult experts who could assist during trial when the State, foreseeably, introduced damaging expert testimony regarding the blood evidence in the case.[8]

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[8] We do not, as the dissent complains, "force counsel to seek expert advice at every stage of the proceedings, even when counsel believes that it will not be helpful and will detract from the other issues counsel must confront." Dissent at 10711. Rather, we fault counsel for failing to conduct the requisite investigation about a critical issue in the case at the first stage -- before settling on his defense strategy -- and then for failing to rectify his deficient performance at any of the subsequent times he had the opportunity to do so.

Counsel had three separate opportunities to consult with forensic experts about the source of the pool of blood. Had he consulted an expert at the outset, it would have been unnecessary to repeat his investigation each subsequent stage; he would have only had to follow through on the information obtained from his initial investigation as appropriate -- in this case, by presenting expert testimony at trial and by employing expert advice as to how he could effectively cross-examine the prosecution's witnesses or counter their expert testimony with expert testimony of his own. Counsel failed, however, to investigate at the first opportunity. Having done so, he had a continuing constitutional obligation to perform that duty at each subsequent opportunity. Each time, he failed to do so. This clearly constitutes deficient performance.

Moreover, the dissent fails to explain how counsel was in a position to make a reasonably informed decision as to whether expert assistance would be helpful at any of these three stages, given his admitted lack of knowledge about the relevant fields of forensic science. *See Strickland*, 466 U.S. at 690-91 (holding counsel's strategic choices are entitled to deference to the extent they are supported by reasonable professional judgments). Counsel admitted that he had no independent knowledge of blood type or blood spatter science before he began working on this case. He further admitted that he did not conduct independent research to educate himself about either science until mid-trial, when he read a single book about blood typing the night before Spriggs' testimony, and his deposition testimony is silent on any research or investigation he conducted that would have allowed him to make an informed decision as to whether a blood spatter expert would be helpful in interpreting the forensic evidence. Thus, the record demonstrates through counsel's own testimony that he could not have made an informed decision leading up to trial that seeking expert assistance would be unhelpful or counterproductive.

[955]

1.

Strickland obligates defense attorneys to make reasonable investigations before settling on a trial strategy or, at the least, to conduct sufficient inquiries to make an informed decision about whether further investigation is needed. *See Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (holding counsel must make an "informed choice" among possible defenses); *Strickland*, 466 U.S. at 690-91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *see also Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002) ("[A]ttorneys have considerable latitude to make strategic decisions about what investigations to conduct *once they have gathered sufficient evidence upon which to base their tactical choices*." (emphasis in original)). Until a reasonable investigation is conducted, counsel is not in a position to make critical strategic decisions or settle on a trial strategy -- certainly including the decision to rest on his client's testimony irrespective of the forensic facts. We have repeatedly held that "[a]n uninformed strategy is not a reasoned strategy," *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008), *cert. denied sub* *nom. Schriro v. Correll*, 129 S. Ct. 903, 173 L. Ed. 2d 108, 2009 WL 56214 (2009), and we have followed the Supreme Court's holding that "the traditional deference owed to the strategic judgments of counsel is not justified where there was not an adequate investigation 'supporting those judgments,'" *id.* at 948-49 (quoting *Wiggins*, 539 U.S. at 521).

Counsel's strategy, as explained in his deposition, was to pit his client's credibility against Johnson's and to attack the evidentiary gaps in the police investigation of the crime scene. In light of *Strickland*, it was not reasonable to settle upon this strategy, as counsel did, without investigating whether it was a sound one. Counsel made no inquiry into what expert testimony might be available to support, or to contradict, his client's version of what occurred; by what means the perceived evidentiary gaps in the State's investigation might be filled at or before trial; how any testing to fill those gaps would affect either his client's or Johnson's credibility; or how he could respond to, or minimize **[956]** the effect of, the damaging testimony that might emerge from forensic blood testing. Counsel's decision not to consult any forensic expert in blood evidence before settling upon a defense strategy that excluded the use of expert testimony, when the defense so clearly depended upon the source of the pool of blood in the doorway, indubitably fails to meet *Strickland*'s standard of care. *See Strickland*, 466 U.S. at 690-91. Indeed, this failure, in itself sufficient to require a holding of deficient performance, marked only the beginning of counsel's inexplicable series of ineffective acts and omissions.

2.

Having chosen his trial strategy without conducting an adequate investigation, counsel then continued to perform deficiently by failing to consult an expert on blood evidence while preparing for trial. A reasonably competent attorney would have made inquiries of such an expert regarding what evidence might be available that would strengthen the chances that his "he said-he said" strategy would succeed or might cause him to broaden that strategy were he to locate an expert whose testimony would support his client's statements. For some unexplained reason, counsel again failed to consult any blood expert who could provide advice as to what forensic evidence might be adduced to support Richter's version of the events -- or what forensic evidence the State might adduce, either prior to or during trial, that might seriously undermine the defense, and how that evidence might be countered.[9] Instead, counsel willfully pursued his credibility theory, determined to rely on Richter's testimony alone, knowing all the while that his client was not a witness likely to appear particularly credible to a jury. In doing so, counsel not only neglected the opportunity to discover the availability of objective corroborating forensic evidence in support of his client's version of the facts, but also rendered the defense vulnerable to impeaching expert testimony that he was not prepared to rebut.

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[9] We agree with the dissent that counsel's decision not to ask the prosecution to test the blood sample before trial in order to determine the blood type was not unreasonable, as such a test might have eliminated existing ambiguities that were useful to the defense and instead have produced definitive results that were damaging. However, there could have been no

negative consequence to consulting a blood spatter expert or a serology expert prior to trial. An adequate pretrial investigation would not have alerted the State to counsel's strategy, or somehow "cooked his own client." Dissent at 10711. Had counsel consulted a blood spatter expert, the State would have been unaware that he had done so until the point at which counsel presented expert testimony at trial, and then only if he made an informed decision that doing so would be helpful to the defense. Had counsel consulted a serology expert, the State would similarly have been unaware of such pretrial consultations unless and until counsel made an informed decision to ask the expert to test the blood type, or until he presented the expert as a witness to counter the testimony of the State's serology expert. Such consultations would not, therefore, have posed any risk. They would, however, have provided crucial assistance to counsel in deciding whether or not to present expert testimony, as well as in preparing for the possibility that the State would introduce adverse forensic evidence.

Counsel is obligated to conduct a reasonable investigation in order to present the most persuasive case that he can. Counsel must conduct a pretrial investigation into the availability of independent, objective sources to support the part of his client's testimony that he knows or can reasonably expect will be challenged, and subsequently to present to the jury any evidence he finds that tends to show his client's innocence, tends to undermine the prosecution's case, or raises a reasonable doubt as to his client's guilt, unless he **[957]** makes an informed, strategic decision that the risks of introducing such evidence outweigh its benefit to the defense. *See, e.g.*, *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995) ("An attorney 'must provide factual support for the defense where such corroboration is available.' . . . Failure to pursue such corroborating evidence with an adequate pretrial investigation may establish constitutionally deficient performance." (quoting *United States v. Tucker*, 716 F.2d 576, 594

(9th Cir. 1983)) (internal alterations omitted) (emphasis added)); *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997) (granting "an evidentiary hearing on the issues of his attorney's failure to investigate . . . before trial and his lawyer's failure to test the evidence"). In some circumstances, such corroboration may take the form of eyewitness testimony or character witnesses. In this case, a forensic explanation of the source of the pool of blood at the bedroom doorway could have supported the defendant's account. Counsel made no effort to obtain any evidence or expert assistance that would provide such an explanation. "This court has repeatedly held that 'a lawyer who fails adequately to investigate and introduce evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.'" *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)) (internal alterations omitted), *cert. denied sub nom. Duncan v. Ayers*, 129 S. Ct. 1614, 173 L. Ed. 2d 1001, 2009 WL 735709 (2009). The obligation to investigate only grows more imperative where the evidence at issue is the "only forensic evidence" that could reasonably support the defense theory. *Duncan*, 528 F.3d at 1236 ("[T]he central role that the potentially exculpatory blood evidence could have played in [the defendant's] defense increased [counsel's] duty to seek the assistance of an expert.").

We therefore strongly reject the district judge's conclusion that counsel's investigation was understandably hamstrung by the element of surprise -- that his failure to consult experts was reasonable because he did not learn until mid-trial that the State would call a blood spatter or serology expert, and that he was at this point struggling to deal with significant time constraints and the limitations of his co-counsel. *See Richter v. Hickman*, No. S-01-CV-0643-JKS, 2006 U.S. Dist. LEXIS 24856, 2006 WL 769199, at *8 (E.D. Cal. Mar. 24, 2006). This argument truly misperceives the duty of counsel to investigate. The unfortunately harried circumstances in which counsel found himself in the midst of trial, a year after the events in question took place, do not excuse his failure to investigate prior to trial -- indeed prior to determining the defense strategy -- whether expert testimony would corroborate or undermine his client's explanation of how the pool of blood came to lie on the floor by the bedroom door. Whether or not the prosecution presented any expert testimony about the pool of blood, defense counsel had an obligation to investigate and, should his investigation prove successful, introduce expert testimony regarding its source in order to provide crucial -- indeed, potentially outcome-determinative -- corroboration for his client's story.[10]

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[10] We also reject the excuse that counsel believed that the prosecution would not present any expert testimony. That the State would present expert forensic testimony was entirely predictable. To the extent that counsel believed otherwise, relying on the element of surprise in telling a story of self-defense that the prosecution had not anticipated, in which Klein was killed not on the couch but near the doorway to the bedroom, his performance was unreason-able. Any competent counsel would have known that, whatever element of surprise he might have counted on would be dissipated when he disclosed in his opening statement that he would attack the prosecution for failing to conduct necessary forensic investigations to prove that Klein was killed on the couch rather than by the doorway. That is precisely what occurred. Following

> counsel's opening statement, the prosecution investigated the availability of such forensic evidence forthwith, leaving the defense as the only party without expert testimony. Counsel failed completely to prepare for the possibility that the prosecution would obtain such evidence and, consistent with his performance up to that point, failed to consult any expert to determine how to handle the State's likely response to his client's version of the events. As a result, once he was confronted at trial by forensic evidence that undermined the theory he had presented to the jury, he had to hastily try to educate himself in order to prepare for cross-examination, had no informed basis for evaluating whether his cross-examination of the prosecution experts would be effective, and failed, once again, given the time constraints, to retain and call experts to develop alternate testimony, attack the prosecution expert's methodology as unsound, or even advise him as to how to perform an adequate cross-examination.

As it turned out, then, counsel guessed wrong when he thought, unreasonably, that the source of the blood would be determined entirely through a credibility contest rather than expert testimony. Guessing wrong does not usually amount to incompetent representation; even the best lawyers guess wrong on occasion. But being unprepared for the consequences of a wrong guess, when the issue is critical to the defendant's case, may well amount to ineffective performance.

[958] Finally, we reject the district court's conclusion that counsel's failure to consult experts in preparation for trial was reasonable because counsel thought that the case was, at bottom, a credibility contest. *Richter*, 2006 U.S. Dist. LEXIS 24856, 2006 WL 769199, at *7-8. Precisely the opposite is true. Where the defense strategy is to win a credibility contest, the importance of corroborating the accused's testimony with physical evidence is paramount.

Leaving the jurors to believe or disbelieve defendants solely on the basis of their own testimony, without supporting evidence, where such evidence could be obtained with diligent investigation, is objectively unreasonable. *See, e.g.*, *Riley v. Payne*, 352 F.3d 1313, 1319-20 (9th Cir. 2003) ("[W]ithout any corroborating witnesses, [Riley's] bare testimony left him without any effective defense." (internal quotation marks omitted)); *Hart*, 174 F.3d at 1070 ("Defense counsel failed to investigate or introduce into evidence the records that fully corroborated [the witness's] statements. Thus, the jury was left to decide, without benefit of supporting or corroborative evidence, whether [the witness's] testimony was truthful and accurate, or whether it was unreliable or offered simply in an effort to assist a former lover."); *Lindstadt v. Keane*, 239 F.3d 191, 203 (2d Cir. 2001) ("[I]n a credibility contest, the testimony of neutral, disinterested witnesses is exceedingly important." (quoting *Williams v. Washington*, 59 F.3d 673, 681-82 (7th Cir. 1995))). Relying on a pure credibility contest without seeking to investigate the availability of corroborating evidence is unreasonable regardless of the witness; it is at its most unreasonable, however, when the witness is the defendant himself -- especially when he is an admitted drug offender who stands accused of committing murder and attempted murder in the course of a burglary.

If counsel's decision not to consult experts in preparation for trial had been a "strategic judgment," it would have been an unreasonable one, as there was no adequate investigation to support it. *See Strickland*, 466 U.S. at 690-91. But, even more fundamental, counsel's performance in this respect was not "strategic" at all. There was absolutely no reason not to consult a blood expert and counsel never suggested that there was. In his deposition, counsel was unable to provide any reasoned explanation for failing to consult forensic experts or to seek **[959]** expert testimony in order to corroborate his client's testimony or prepare to rebut the prosecution's case.

Certainly, he did not suggest that any strategy explained that failure. When counsel offers no strategic reason for failing to perform what would otherwise constitute the duty of a reasonably competent counsel, we may not invent such a strategy by engaging in "a post hoc rationalization of counsel's conduct" in lieu of relying on "an accurate description of [counsel's] deliberations prior to [trial]," *Wiggins*, 539 U.S. at 526-27.[11] Counsel's chosen trial strategy, as he explained it, was to convince the jury of an alternative set of facts to those presented by the prosecution -- and to rely on his client's testimony to carry the day in a pure credibility contest. The defense testimony would be that Klein was killed in the doorway, in a shootout, and the alleged robbery of the gun-safe never took place. Counsel provided no reason why he did not consult experts to bolster that story. Although he had an obligation to adequately investigate so as to support the strategy that he had adopted, he failed to do so. It is perfectly clear, and indeed it is the only reasonable conclusion under *Strickland*, that his performance was constitutionally deficient.[12]

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[11] Despite the dissent's allegation that we have retroactively imposed our own theory of the case, Dissent at 10712, we in no way suggest a new or different strategy for counsel. Rather, it is our dissenting colleague who has suggested a strategic rationale for counsel's actions that finds

no support in the record. *See* Dissent at 10747-48 (suggesting that counsel did not consult a blood spatter expert because he "had good reason to believe that a blood spatter expert would not be able to confirm his client's story"). Our colleague's valiant but wholly unpersuasive explanation indubitably constitutes a "post hoc rationalization of counsel's conduct."

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[12] The present case is therefore unlike *Knowles v. Mirzayance*, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009), in which counsel made a careful, strategic, and reasonable decision not to pursue a hopeless defense. In that case, there was no failure to investigate; counsel, after investigating, had drawn a well-informed conclusion that it was futile to present a defense of not guilty by reason of insanity to a jury that had convicted the defendant of first-degree murder after considering the same evidence of mental illness. Counsel's failure here to present expert testimony on the source of the pool of blood was not, by contrast, a well-considered decision; rather, it was the result of his failure to investigate in order to seek to discover available evidence that might be critical to his case. Nor would presenting such forensic evidence have been an exercise in futility. As will be discussed with regard to prejudice, it would instead have significantly undermined a critical aspect of the prosecution's case.

3.

Counsel's failure to conduct the necessary pretrial investigation was compounded finally by his failure to consult experts as the trial unfolded. After counsel presented his opening argument laying out the defense strategy and pointing out the gaps in the prosecution's case, including its incomplete forensic investigation, the State acted quickly to fill some of these gaps and to determine whether it could prove its case or at least disprove the defense theory through the use of forensic evidence. The State then introduced "surprise" testimony from two experts on blood evidence: a blood spatter expert and a serology expert. The thrust of their testimony was that the sole source of the blood in the pool was Johnson and that none of the blood was Klein's.

The prosecution's blood spatter expert, Detective Robert Bell, testified that it was highly unlikely that Klein could have been killed in the doorway and carried to the couch, primarily because of blood flow patterns on his head and high velocity blood spatter near the couch. After this damaging **[960]** testimony, defense counsel considered consulting a blood spatter expert of his own. He discussed with Richter whether to call such an expert, and opted to wait until after cross-examination to decide. Counsel researched and gathered names of potential blood spatter experts, but does not remember contacting anyone. He failed to request a continuance in order to obtain expert testimony to counter the prosecution's evidence, or even to obtain assistance in preparing for cross-examination of the prosecution's witnesses. Indeed, he did not consult an expert at any point after Bell testified, even though Bell was recalled twice, including once on rebuttal, during a trial that lasted nearly a month.

The prosecution also called a serology expert, Jill Spriggs, who tested the blood type of a sample of blood on the door molding above the blood pool in the doorway and testified she had "no reservations. [Klein] is excluded as a possible donor of that sample." Counsel again considered the possibility of consulting an expert, this time on blood typing, but he did not do so. After speaking with the State's serology expert in advance of her testimony during trial, counsel was prompted to do some reading on his own, and again to compile a list of potential experts, but he could not recall actually contacting anyone. When the State announced its intention to call Spriggs as an expert witness, counsel raised an objection. According to counsel, the judge then "said that [counsel] may need a continuance and that [he] may need to call an expert now [him]self." Counsel offered conflicting testimony as to whether he did, in fact, request a continuance this time. It is clear, however, that again he did not consult any blood expert whatsoever.[13]

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[13] The research that counsel conducted on his own after learning about Spriggs' upcoming testimony was more modest than the dissent suggests: at his deposition, counsel testified that a librarian helped him find "several different books, one of which [he] took home and read."

In the end, counsel again failed to consult a single expert in the field of blood evidence, this time to help him prepare for his cross-examination of the State's two expert witnesses once he knew that they would testify. He, further, made no effort to consult forensic experts so as to present testimony in rebuttal.[14] When the need **[961]** for expert advice was abundantly clear, counsel still failed to take reasonable steps mid-trial to remedy his deficient pretrial investigation and preparation. That failure was itself deficient, and the state court's decision to the contrary was objectively unreasonable.

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[14] The dissent excuses this mid-trial failure by explaining that counsel acted reasonably by relying solely on his cross-examination of the State's serology expert instead of introducing expert testimony of his own that might have been available. Dissent at 10734-35. That position is simply erroneous. When defense counsel obtains concessions from the witness on cross-examination, that may on occasion be sufficient

to establish reasonable doubt. It is not ordinarily, however, a substitute for affirmative evidence that would directly prove the point to be established. Here, equivocal statements by a prosecution witness in no respect serve the same function as positive affirmations by defense experts. That would seem to be an elementary tenet known to all trial lawyers. Moreover, in this case, Spriggs repeatedly disavowed any possibility that Klein's blood was in the pool. She did admit that if the blood sample was degraded, it would be possible that the 1+ band would be less intense than she expected, but she saw no indication that in this case the sample was degraded. On redirect, she repeated conclusively that she had "no reservations. [Klein] is excluded as a possible do-nor of that sample." From the standpoint of a jury, the cross-examination of Spriggs was in no way comparable to the evidence that could have been introduced by an expert witness for the defense.

Moreover, where an attorney lacks expertise in a scientific subject such as blood typing, he is in a poor position to determine whether his cross-examination has touched upon the most important weaknesses in the expert's testimony. If counsel in fact decided that another expert would not "interpret the serology evidence any differently than the State's expert," Dissent at 10735, as the dissent without any support claims that he did, he made that assessment based not upon a reasonable investigation but entirely on speculation. In fact, counsel quickly realized after trial that he had failed to question Spriggs adequately about reasons for the relative intensity of the 1+ band other than degradation, important evidence that an expert, had one been consulted, would have been able to quickly point out.

4.

In short, the Supreme Court has held that the touchstone of our inquiry must be the reasonableness of counsel's conduct. The failure here to consult forensic experts regarding critical issues in the case was unreasonable and constitutes deficient performance. Other circuits, also under deferential AEDPA review, have come to similar conclusions. *See Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005) (finding deficient performance under AEDPA where "the failure to investigate the forensics of the fatal bullet deprived [the defendant] of a substantial argument, and set up an unchallenged factual predicate for the State's main argument that [the defendant] intended to . . . . [The defendant] became the sole source of evidence available to counter the prosecution's theory."); *Gersten v. Senkowski*, 426 F.3d 588, 607-08 (2d Cir. 2005) (finding deficient performance under AEDPA where "defense counsel failed to call as a witness, or even to consult in preparation for trial and cross-examination of the prosecution's witnesses, any medical expert on child sexual abuse"). Here, the source of the pool of blood was critical. If the blood came in whole or in part from Klein, defendant's version of the events would be strongly corroborated. If it came from Johnson alone, the prosecution's case would be strengthened immeasurably. We conclude that counsel's failure to consult any forensic experts regarding how to establish that source (1) before settling on his defense, (2) when preparing for trial, or (3) during the course of trial when he was surprised by the prosecution's expert testimony cannot be deemed to be reasonable under any standard, and that the state court's failure to so determine unquestionably constituted an objectively unreasonable application of Strickland.

B. Prejudice

Richter must show more, however, than his counsel's deficient performance. He must also show that he was prejudiced by that performance -- that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Applying this standard, we hold that counsel's deficient performance was prejudicial, and that the state court's failure to so conclude was an objectively unreasonable application of *Strickland*.

Counsel's pretrial failure to consult experts who could have interpreted the blood evidence at the crime scene and advised him of its significance had direct, and damaging, consequences. Counsel developed a strategy for trial to treat the case as a pure credibility contest, to call only the defendant as a witness regarding the shooting, and to criticize the state's incomplete investigation of the crime scene, without any knowledge whether forensic evidence, if introduced, would corroborate or contradict his client's testimony. He assumed that the prosecution would not offer any expert forensic evidence to support **[962]** the testimony of its principal witness and did not prepare for the possibility that it would. In the end, the prosecution did introduce damaging expert testimony on blood spatter and blood typing that undermined Richter's account and the defense theory as a whole. At this point, counsel was unequipped to respond to it. These negative consequences, in turn, were exacerbated by counsel's failure during the trial to make reasonable efforts to compensate for his inadequate pretrial investigation; even at this point, he did not consult a single expert who could advise him whether exculpatory evidence existed that he might present or how he might successfully cross-examine the prosecution's experts or counter their testimony. Critically, as a result, counsel failed to introduce any expert testimony --

testimony that could likely have raised reasonable doubts in the minds of the jurors.

Counsel's failure to present expert testimony at trial did not go unnoticed. In closing, he emphasized the significance of the pool of blood in the doorway, citing it as evidence of the location at which Klein had been killed. The prosecutor, in response, drove home the fact that the defense had presented no evidence to support its version of the events, other than Richter's testimony. He then ridiculed defense counsel's failure to present any evidence to support his account of the source of the pool of blood, and especially *his failure to call any expert witnesses*:

> Bob Bell, [the state blood spatter expert,] he's 22 years as a blood spatter expert, all that stuff means nothing. Hey, [defense counsel] says, the blood be here. Bob Bell, hey he's wrong, trust me. I am not going to go get an expert. I am not going to bring some-body in here to tell you because I don't need to do it. I will just do it in closing argument. I will just say it. If you are willing to believe me, hey, that will work.
>
> I am not going to worry about Jill Spriggs[, the state serology expert,] because, hey, her seven years as a biochemist and a criminalist, and the fact that she went to college to learn this stuff doesn't mean anything, because I am a lawyer. I went to California, Berkeley, in 1975 and U.O.P. and played ball in Mexico, and I know more than Jill Spriggs. *But I am not going to pay and bring in an expert to show you.* I am not going to put anyone up here to tell you that. I will just tell you that. I am a lawyer. I can do it.

(Emphasis added). Because expert testimony that contradicted that offered by the prosecution was in fact available, and strongly persuasive, the harm caused by counsel's failure to make any effort to obtain it is readily apparent, and devastating.

Had counsel bothered to conduct the requisite investigation, his efforts would have been highly productive. On state and federal habeas review, Richter's new counsel conducted the investigation that trial counsel had failed to perform, and with significant effect. Habeas counsel submitted declarations from four experts in blood evidence, all of whom would have offered testimony that supported the defense theory of the case. Taken together, they would have established reasonable doubt.

Most significant, and most damaging to the prosecution, Ken Moses, an expert in blood spatter analysis with over thirty years of experience in the field, would have directly refuted the prosecution's explanation as to the source of the critical pool of blood. Specifically, he would have offered his opinion that "[t]he lack of a large number of satellite dropletts [sic] surrounding the pool *eliminates* the prosecution's theory that Mr. Johnson was standing into [sic] the doorway dripping into the pool below" (emphasis added). Moses would have **[963]** been a most persuasive witness. He had established the Crime Scene Investigations Unit of the San Francisco Crime Laboratory in 1983 and, over the course of his career "[a]s an Inspector-Sergeant and senior crime scene investigator with the San Francisco Police Department . . . investigated hundreds of violent crimes . . . in which [he] applied the science of bloodstain pattern interpretation," and had on numerous occasions been qualified as an expert.

Additionally, James Thornton and Brian Wraxall, experts in blood typing, would have testified to the scientific possibility that the pool contained some of Klein's blood, because the relative intensity of the 2+ and 1+ bands found in the blood sample could not exclude the possibility that the blood pool contained a mixture of Johnson's (subtype 2+ 1+) and Klein's (subtype 1+) blood. Finally, Dr. Paul Herrmann, a pathology expert, would have opined that,

> [g]iven Mr. Johnson's testimony and the amount of blood likely to result from the wounds which he received, and the short time between Mr. Johnson being shot and Detective Wright making his observations of Mr. Johnson, it is highly unlikely that the blood pool found in the doorway between the bedroom and living room was caused by Mr. Johnson's wounds.

No such expert testimony was presented to the jury.[15]

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[15] The parties stipulated that the defense experts would testify to the information sworn to in their declarations. In their declarations the experts stated that they would have been available to testify as to their opinions if they had been called at trial. We therefore consider the statements in these declarations as the relevant testimony that could have, and would have, been presented at trial.

1.

Although the failure to consult any forensic expert with respect to blood evidence constituted deficient performance, the investigation conducted during the habeas proceedings reveals that the primary source of prejudice lay more narrowly in counsel's failure to consult, and subsequently to call, an expert in blood spatter.

To explain the significance of the blood spatter testimony, it is necessary to reiterate the importance of the pool of blood -- that it was, in fact, the linchpin of the defense. If Klein was killed while lying on the couch in the living room, there was no possibility that Richter's account was correct. If, in contrast, Klein was killed in the doorway to the bedroom, Johnson's account of the events in question could not possibly be true. Indeed, if any portion of the blood in the pool in the doorway came from Klein, he could not have been shot, as Johnson claimed, while he was asleep in another location. Accordingly, had defense counsel been able to raise a reasonable doubt in the minds of the jurors as to whether Klein was a source, in any part, of the pool of blood, there was more than a reasonable chance that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The introduction of forensic evidence that had the effect of showing that Johnson's version of the events was false, and that was consistent with Richter's explanation, would therefore have been invaluable to the defense.

Had counsel conducted an adequate pretrial investigation and, as a result, offered Moses' blood spatter testimony at trial, the jury would have been presented with testimony from two expert witnesses on blood spatter, one for the prosecution (Bell) and one for the defense (Moses), each of whom would have contradicted key pieces of the theory presented by the opposing side. On the one hand, the spatter evidence **[964]** presented by Richter's habeas counsel would have conclusively refuted the prosecution's explanation of the source of the all-important pool of blood: that it contained only Johnson's blood, which dripped to the floor as he stood awaiting the police's arrival. Indeed, Moses' expert testimony that the pool could not have been formed in that manner remains undisputed. On the other hand, the prosecution's unrebutted testimony about high velocity spatter near the couch and the blood flow on Klein's face would have supported the conclusion that Klein was killed on the couch. Each expert's testimony was material to resolving the central dispute in the case: Klein's physical location when he was shot and, by extension, the circumstances of Klein's death and the credibility of the key participants.

In the absence of Moses' testimony, the only expert explanation of the evidence that the jury heard was consistent with the prosecution's version of the case. Had the jury also heard expert testimony from Moses, it would have been faced with highly credible forensic evidence from an experienced former law enforcement officer that directly contradicted the prosecution's version and raised substantial doubt as to the testimony regarding the circumstances of Klein's death offered by the key prosecution witness. At this point, to reconcile either Johnson or Richter's narrative with the forensic evidence, the jury would have had to conclude that one blood spatter expert or the other was wrong or untruthful. We cannot, of course, determine which expert the jurors would have believed, or if they would have been able to determine beyond a reasonable doubt that one or the other was correct. We can determine, however, that, under these circumstances, counsel's failure to present blood spatter expert testimony undermines our confidence in the result and, accordingly, was prejudicial.[16] Moreover, because the prosecution's case rested so heavily on Johnson's testimony, impeaching his credibility on a central point through forensic evidence would have likely precluded the jury from returning a verdict of guilty.

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[16] The dissent advances a curious argument why the failure to introduce blood spatter evidence could not have been prejudicial. Because Bell's unrebutted testimony that the high velocity spatter on the couch meant that someone had to have been shot there, the dissent reasons -- derisively -- that the jury could accept Richter's story that Klein had been shot by the bedroom door only by creating a third shooting victim who had been shot by the couch. *See* Dissent at 10748-49, 10753. The dissent fails to acknowledge, however, that for a precisely analogous reason, the jury could accept Johnson's story that Klein had been shot on the couch only by inventing a third shooting victim who created the pool of blood by the bed-room. Given Moses' unrebutted testimony that the blood pool could not have come from someone standing by the bedroom, and given that Johnson did not testify that he squatted, sat, or stretched out on the floor by the bedroom, the jury could not, without a similar degree of creativity, accept the prosecution's explanation of the events. The important fact is that a jury -- just like the dissent -- could not reasonably conclude that both experts were correct while also accepting the prosecution's version of the events. Because we cannot determine which expert the jury would have believed and certainly cannot determine that in light of Moses' testimony it would have found beyond a reasonable doubt that the prosecution's explanation of the events was accurate, our confidence in the outcome is necessarily undermined.

The expert blood spatter testimony was also essential in light of substantial weaknesses in the prosecution's case, that rendered it highly likely that expert testimony would determine the outcome.[17] Here, **[965]** neither explanation of the events -- neither the story presented by the prosecution nor that presented by the defense -- was wholly satisfactory. The prosecution provided no convincing explanation why Richter and Branscombe would have returned to a house that they knew to be occupied to steal a gun-safe that had, only weeks before, been left for safekeeping in Richter's garage. If Richter desired to obtain its contents, it would have been far easier for him to tell Johnson, while it had been left in his possession, that a third party had stolen it. Nor did the prosecution offer any explanation for the numerous inconsistencies in Johnson's account of the events in question, including his initial report that there were four or five assailants, then that there were three, and then that there was only one. Nor did it explain Johnson's inability to accurately describe his assailants, even though he later asserted that they were two individuals he knew extremely well. It would appear that at the least Johnson's mental processes were not functioning normally at the time of the shooting -- perhaps because of a mixture of drugs and alcohol -- which might explain why, in his befuddled state, not recognizing Branscombe, he may have shot what appeared to him to be an intruder when he awoke and saw an unknown person unexpectedly in his house. There were other less important puzzling items, such as Johnson's contradictory testimony about where he kept his .380 caliber gun. Also, the prosecution could not adequately explain why there was no blood spatter on the sleeping bag where Klein allegedly was lying when he was shot, and why there was no blood on the light switch in the bedroom, although Johnson claims that he turned on the light after touching his bloody face. Moreover, Johnson was overall a less-than-credible witness. He was a big-time marijuana and psilocybin mushroom dealer who sold approximately a pound of marijuana per day. He twice received immunity from the prosecution in exchange for his testimony. Johnson was also a prolific gun collector who had at least on one occasion purchased a stolen handgun -- the .32 caliber pistol that Branscombe ultimately used to shoot him. Earlier in the evening in question, Johnson had apparently been ready and willing to use his firearm: He had drawn a loaded weapon and pointed it at Richter and Branscombe when he didn't recognize their car in his driveway.

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[17] Indeed, it appears likely that it was in part because of the limitations of the State's case -- in particular, the credibility problems of its main witness -- that it undertook a last-minute effort to gather forensic evidence and then relied so heavily upon that evidence during the remainder of the trial and in closing argument. Refuting the State's forensic case would, therefore, have been critical for Richter.

Of course, the defense's explanation, too, had holes. The story Richter told raised a number of questions: Why were there .22 caliber cartridges found in his garage? How had Johnson carried Klein to the couch with so little evidence of blood flow? Why was the safe thrown haphazardly on a pile of other belongings in Richter's garage, rather than standing upright as a witness had seen it previously? Why had

Richter and Branscombe taken off for the Yolo bypass shortly after the killing and not returned until the next day? Why did Richter initially tell the police that his truck was not at Johnson's house on the night in question? Even aside from these questions, Richter suffered from credibility problems. He was a marijuana and mushroom user himself, as well as an occasional dealer.[18]

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[18] Despite the questions raised by his testimony, we must note that Richter's account was not, on the whole, implausible. The most damaging evidence at trial was Detective Bell's blood spatter analysis. In many other ways, Richter's version of the events, which the dissent deems "highly improbable," Dissent at 10754, was internally consistent and provided a coherent explanation for the evidence introduced at trial. For example, Richter testified that he had been paid in cash on the night of Klein's death; that he dropped a $100 bill at the Yolo bypass was therefore perfectly understandable in light of his testimony. Richter also explained, moreover, why he and Branscombe returned to the Christmas tree lot late at night, rather than waking up a couple of hours later to clean out their belongings from the trailer by the following morning and why they returned to Johnson's house. Also consistent with Richter's explanation, Johnson had in fact tried to modify his M-12, attempting to convert it into a fully automatic weapon, thus explaining why it might have jammed.

[966] In light of the weaknesses in both sides of the case, we cannot say definitively that Richter would have been acquitted, even had the defense's blood spatter expert testified that blood dripping from Johnson while he stood and waited in the doorway for the police to arrive could not have formed the pool near the bedroom door. There are a number of factual inconsistencies in this case pointing in both directions, and it is impossible to say what verdict the jury might have reached had it heard all the relevant evidence. But certainty has never been the standard to which we hold ourselves, even on AEDPA review. The existence of factual inconsistencies in a case does not absolve defense counsel of the responsibility to investigate; nor does it eliminate the likelihood of prejudice when he fails to do so. Rather, introducing forensic evidence that confirms the defendant's version of the event or casts doubt upon the prosecution's is even more critical in such circumstances and even more likely to establish reasonable doubt in the minds of the jurors. Our obligation is to determine whether there is a "reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. A "reasonable probability" does not require certainty, or even a showing that it is "more likely than not" that a different outcome would have resulted. *See Sanders*, 21 F.3d at 1461. Rather, the probability must simply be "sufficient to undermine [our] confidence in the outcome." *Strickland*, 466 U.S. at 694. Here, our confidence is unquestionably undermined. We cannot say -- and we do not believe that any reasonable adjudicator could -- that the defense expert's spatter testimony, when considered along with all the evidence previously introduced, would not have resulted in reasonable doubt.[19]

According the state court the deference mandated by AEDPA, we nonetheless hold that it was an unreasonable application of *Strickland* for that court to conclude that counsel's failure to conduct an adequate investigation into the source of the pool of blood and to adduce expert blood spatter testimony that corroborated the defense's version of the facts, did not constitute prejudice and thus did not violate Richter's Sixth Amendment right to effective assistance of counsel.

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[19] Of course, contrary to what the dissent appears to believe, the evidence need only raise a reasonable doubt as to the defendant's guilt, not conclusive proof of the defendant's innocence.

2.

As we have explained, the blood spatter testimony alone was sufficient to give rise to reasonable doubt in the minds of the jurors. We note, however, that such doubt would have been reinforced had counsel also offered expert testimony on blood typing to rebut that of the State's serology expert.[20] The expert declarations from **[967]** Thornton and Wraxall, presented during habeas proceedings, do not prove definitively that Klein's blood was in the pool, but they tend to counter the testimony by the State's serology expert that Klein was excluded as a source of the blood sample taken from the door molding above the pool.[21] The testimony of the two defense experts, if credited, serves to establish the possibility that the pool contained a mixture of Johnson's and Klein's blood and raises a reasonable doubt as to the prosecution's contrary view. If that expert testimony had been presented along with Moses' blood spatter testimony, the expert evidence as a whole would have allowed the defense to argue that both the blood spatter evidence and the serology evidence supported -- or, in the case of the serology evidence, at least did not conflict with -- the theory that the pool contained Klein's blood.

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[20] Taken by itself, the failure to present expert testimony on blood typing did not sufficiently prejudice the defense such that habeas relief would be warranted. However, in combination with the failure to present expert blood spatter testimony, which was prejudicial in itself, the failure to present expert testimony that could have undermined the damaging testimony offered by Spriggs contributed to the overall showing of prejudice.

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[21] Indeed, the State's serology expert adhered strongly to this position throughout. On direct examination, Spriggs stated definitively, "I would include Johnson as a possible donor of the human blood on item 14-A, and I would exclude Klein as a possible donor of the human blood on 14-A." On cross-examination, she did not retreat from that position. Prompted by the Court, she stated, "In my opinion, [the sample] does not contain more than one person's blood." When asked by defense counsel whether she could say that to a scientific certainty, she responded, "Based on the testing that I perform with the PGM sub typing it does not look like there are two people contributing to that stain. It looks like one person." Upon further questioning she continued to insist, "So I am going by based on my testing, based on the intensity of the bands, I do not think there are two people there." Spriggs did acknowledge that it was possible that due to degradation a 1+ band might be less intense than expected. On redirect, however, she further explained that the sample did not appear to be degraded, and that if a sample was degraded, one would get an inconclusive answer, not a wrong answer. On re-cross, her unequivocal final conclusion was that she had "no reservations. [Klein] is excluded as a possible donor of that sample."

In light of Spriggs' testimony, and in light of the obvious fact that the questions posed by counsel on cross-examination are not evidence and may not form the basis for a jury's conclusions, there would have been a significant benefit to the defense had the jury heard directly from an expert that the possibility of blood mixing existed in this particular case, and that a source of the blood in the pool could well have been Klein.

Although we base our prejudice holding on counsel's failure to introduce blood spatter evidence, that holding is bolstered by the detrimental effects of counsel's failure to consult a serology expert -- both because he could have introduced expert testimony that would have supported his case and because an expert could have advised him as to how to cross-examine the prosecution's witnesses.[22] *Strickland* requires us to assess the aggregate impact of counsel's deficient actions when evaluating whether such failures are prejudicial. 466 U.S. at 695-96. Here, the jury would have been even more likely to credit Moses' testimony that the blood pool could not have been formed by the dripping of Johnson's blood while he stood **[968]** waiting for the police to arrive if the prosecution's serology testimony was also cast into doubt.[23] While it would not have been unreasonable for the state court to conclude that, by itself, the failure to present serology evidence was not prejudicial, the absence of that expert testimony contributed to the prejudice that resulted from the failure to offer expert blood spatter testimony.

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[22] Counsel acknowledged that he missed crucial information when conducting his cross-examination. He "remember[ed] kicking [him]self" after trial because he failed to elicit from Spriggs the possibility that, even without degradation, the mixture of Johnson's and Klein's blood could have produced the 2+ 1+ band it did -- due to the proportions of the blood in the pool, or because Johnson had a stronger 2+ band and a weaker 1+ band. Such testimony certainly would have been significant, particularly because Spriggs testified that it did not appear that the sample was degraded. Counsel acknowledged that "where you have experts like this that you can go to so you don't make those mistakes like I made . . . . Sure, you use them whenever you can. They're a great tool." Nevertheless, without the benefit of such a consultation to confirm whether or not he had adequately questioned Spriggs on cross-examination, "at the time I thought I did an okay job."

[23] Similarly, it would have been helpful to introduce expert medical testimony regarding the amount of blood that Johnson could have deposited in the pool, although it would not have been unreasonable to conclude that, standing alone, the absence of that testimony in this case was not prejudicial. The dissent dismisses Dr. Herrmann's expert opinion, in part because in its view this testimony would have been inadmissible at trial. Dissent at 10741-43. We cannot agree, however, particularly in light of the fact that the parties "agree[d] and stipulate[d] that the . . . declarations of petitioners' expert witnesses are admissible for consideration on the merits, and that [the experts], if called to testify, would testify in conformance with their declarations . . . ." We believe, moreover, that this expert testimony would have been both relevant and significant for the jury to consider. Johnson, we must remember, claimed that he immediately called 911 after finding Klein on the sofa and, contended that in the six minutes before the police arrived, he ran around the house, hid the scale on which he measured marijuana, took two trips outside to throw two marijuana plants over the fence, and called his girlfriend's father. That blood was found in various locations around the house does not negate the medical expert's opinion that the pool in the doorway was too large to have come from Johnson. There was little time for such a pool to form, and further corroborative expert testimony on blood pooling could have been persuasive.

3.

To reiterate, we conclude that Richter was prejudiced by counsel's deficient investigation with respect to the critical question of the source of the blood in the pool by the bedroom doorway. The resultant failure to introduce exculpatory expert testimony on blood spatter, as well as other expert testimony that would, together with the spatter testimony, have raised reasonable doubt in the minds of the jurors with respect to that question undermines one's confidence in the outcome of Richter's case. The state court's conclusion to the contrary constituted an objectively unreasonable application of *Strickland*.

IV.

In so holding, we need not reach Richter's other claims. Because we have concluded that counsel provided ineffective assistance by failing to investigate the source of the pool of blood, and then to introduce expert testimony on that point, and because we have also concluded that the state court decision to the contrary constituted an unreasonable application of *Strickland*, we do not consider here whether counsel's failure to investigate the caliber of a bullet hole found in the floor of Johnson's bedroom was also ineffective. Similarly, we need not decide whether counsel's failure to present lay testimony and expert testimony on firearms was ineffective, nor whether the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), in misrepresenting the size of the bullet hole and the inaccessibility of the piece of floorboard containing it that fell into the crawl space below the house. We do not, moreover, decide whether Richter's Eighth and Fourteenth Amendment rights were violated when the state court provided an incorrect or inaccurate answer to a request for clarification that the jury submitted to the trial court during deliberations.

V.

Counsel's ineffectiveness in failing to investigate and present expert testimony regarding **[969]** the source of the pool of blood is evident. The state court's decision to the contrary constituted an unreasonable application of *Strickland*. The decision of the district court denying a writ of habeas corpus is reversed, and the matter is remanded with directions to enter judgment granting a writ of habeas corpus ordering that Richter be released unless the State elects to re-try him within 90 days of its entry.

REVERSED AND REMANDED WITH DIRECTIONS.

BYBEE, Circuit Judge, with whom O'SCANNLAIN, KLEINFELD, and IKUTA, Circuit Judges, join, dissenting:

Years of consuming forensic science television shows have gone to our heads. We know the plot by heart: the hapless State has charged the wrong guy and our scientists-turned-sleuths will come up with the trial-changing evidence at the last minute. But *State v. Richter* isn't the pilot for *CSI: Sacramento*. Real trials are rarely as gratifyingly formulaic as those seen on TV, and real defense attorneys can seldom boast the Holmesian intuition imputed to them by savvy scriptwriters. In the real world, defense attorneys must often contend with an unsympathetic bench, financial and temporal pressures, and unexpected evidentiary developments. They must also sometimes decide between various unappealing defense strategies. When we ignore these gritty realities and do not adequately analyze the specific circumstances surrounding an attorney's performance, we inevitably fail to heed the Supreme Court's admonition about second-guessing trial counsel. *See Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The majority opinion is a model of the intrusive post-trial inquiry into attorney performance long rejected by the Court. It declares the blood evidence to be "the single most critical issue in the case," one that "any competent defense counsel would have immediately recognized." Maj. Op. at 10681. This would have come as a surprise to both the State--which had focused on other physical evidence and had not even taken a blood sample from the victim before trial--and Richter's counsel, who knew the limited parameters of the State's evidence. What the majority is now convinced was the "central dispute" in the case, Maj. Op. at 10680, sent both sides scrambling mid-trial. The majority now proclaims that no competent counsel could fail to understand the importance of acquiring expert witnesses to testify on the blood evidence, ignoring both the circumstances of the case and counsel's own deposition testimony establishing why he had no reason to believe that such experts would be helpful. As counsel explained, the State had built its case on other evidence and had no witnesses on its list to testify about blood evidence. More importantly, if counsel had conducted the pre-trial investigation demanded by the majority, it not only would have alerted the State to counsel's defense but might well have resulted in the discovery of additional inculpatory evidence. "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant," *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), or if counsel has "reason to believe that certain investigations would be fruitless or even harmful," *Strickland*, 466 U.S. at 691. Had counsel followed the majority's recipe, he might have cooked his own client. Counsel had no way of knowing which way the blood evidence might turn, and he had very good reasons for suspecting that it would not favor Richter. So, his strategy was to address the other physical evidence the State was presenting and then fault the State for its own failure to investigate. The Court has recognized that this is a perfectly reasonable strategy. *Id.*

[970] Far from being "nothing novel," Maj. Op. at 10669, the majority's holding plainly enlarges the constitutional duty of defense counsel to seek out and present expert testimony. The majority's single-minded approach faults counsel for failing to consult with forensic experts (1) before he developed his trial strategy, Maj. Op. at 10683-85; (2) before trial once he selected a strategy, Maj. Op. at 10685-90; and (3) during the trial, Maj. Op. at 10691-93. Our decision will force counsel to seek expert advice at every stage of the proceedings, even when counsel believes that it will not be helpful and will detract from the other issues counsel must confront. Further-more, counsel must now consult an expert on every conceivable evidentiary issue, because our ability to second-guess counsel's decisions knows no bounds. The majority, for example, criticizes counsel for failing to consult two serologists, a forensic pathologist, and a bloodstain pattern expert in part because it was possible that the State might introduce similar experts at trial.

Unlike the cases where the Supreme Court has found *Strickland* error, this is not a case where counsel so neglected his client that "counsel was not functioning as 'counsel.'" *Strickland*, 466 U.S. at 687. Throughout the proceedings, Richter's counsel was conscientious and well-prepared. When the State came up with surprise witnesses to address the blood evidence, counsel diligently prepared for cross-examination and considered whether, in addition, he should retain an expert. He ultimately decided against it, a judgment that majority is more than willing to second-guess. It is not clear, even today, what counsel was supposed to discover. Indeed, nearly fourteen years after the trial, Richter cannot point to any new evidence that affirmatively supports his innocence.

In sum, the majority holds today that defense counsel was required to adopt a different trial strategy--the majority's scorched-earth investigative strategy--and assume new burdens that this new strategy creates. Both counsel's original strategy and the majority's new tactics have some merit, and neither can solve all Richter's problems. But the only reason the majority's strategy prevails over counsel's is that it gets to go last, and counsel's strategy, having proven unsuccessful, can be second-guessed.

I respectfully dissent.

I

Mark Twain once advised never to let the facts get in the way of a good story. The Supreme Court, however, has made apparent that such cannot be the case in determining whether a trial attorney has unconstitutionally deprived a habeas petitioner, through ineffective performance, of his Sixth Amendment right to counsel. Rather, applying the standards of *Strickland* requires a "case-by-case examination of the evidence." *Williams v. Taylor*, 529

U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (Kennedy, J., concurring in the judgment)). Because I believe the majority's story lacks this requisite substance, I recount the facts and the case from "counsel's perspective at the time" before expressing my opinion that defense counsel's performance was reasonable "in light of all the circumstances." *Strickland*, 466 U.S. at 689-90.

A

From all appearances this was an open-and-shut robbery/ homicide. After receiving a 911 call on the morning of December 20, 1994, Sacramento County Deputy Sheriff (and detective) Michael Wright, and his partner, Deputy Steve Larson, arrived at **[971]** Joshua "Gunner" Johnson's house at 5:06 am. Wright entered the house to find Johnson with blood covering his cheeks, shirt, hands, and right shoulder. He saw a man later identified as Patrick Klein lying unconscious on the living room couch, on top of a sleeping bag, with what appeared to be a bullet wound to his left eye. After calling for medical assistance, Wright talked with Johnson, who claimed that he had been attacked earlier that morning.

Both Johnson and Klein were transported to a nearby hospital, where Klein died from his wounds. At the hospital, the attending physician discovered that Johnson had been shot twice: once in his cheek, where the bullet severed an artery and had lodged near his spine; and once in his shoulder. The physician noted that Klein had also received two wounds: a "fairly superficial" wound to his neck, and the fatal wound to his left eye. Both bullets that struck Klein were recovered from his body--the one that entered his neck was determined to be a .22 caliber, and the one that pierced his eye was a .32 caliber. The one bullet recovered from Johnson also was determined to be a .32 caliber.

While at the hospital, Johnson identified the perpetrators as Joshua Richter and Christian Branscombe. Johnson told police that he remembered waking up shortly before 5:00 am to see Richter and Branscombe in his bedroom attempting to steal his gun safe. He sat up, but was immediately shot by Branscombe. After hearing one or more gunshots in the living room, he stood up and noticed that his Cobray M-12 pistol (usually kept on his nightstand) was missing, along with his gun safe and a hip sack containing a pager and around $6000 in cash (proceeds from his daily drug sales). After stumbling into the living room to find Klein bleeding to death on the sofa, Johnson locked the door and called 911. He then ran into the backyard to dispose of several marijuana plants and other drug paraphernalia before the police arrived.

The evidence discovered at Johnson's house largely corroborated Johnson's recollections. About two hours after the 911 call, the police department dispatched homicide detectives to Johnson's residence to analyze the crime scene. Lead detective Robert Bell discovered two expended .32 caliber shell casings in Johnson's bedroom where Johnson claimed to have been shot by Branscombe. The detectives located Johnson's pager lying in the front yard by the porch steps--consistent with Johnson's story that

Richter and Branscombe had stolen his hip sack. The detectives uncovered an ex-pended .32 caliber shell casing and an expended .22 caliber shell casing in the living room, resting on a pile of clothing: these confirmed Johnson's recollection that he heard at least one more shot fired in the living room, and matched the bullets that killed Klein.

Blood was found throughout the house: large blood pools were discovered in the kitchen and in the bedroom doorway; there was a concentration of blood at the end of the couch where Klein's head had been resting; there was blood spatter in the bedroom and near the couch in the living room; and there were blood drops throughout the house. The detectives collected a few blood samples, one from a splash of blood on the molding above the blood pool in the bedroom doorway. Be-cause Detective Bell ascertained that the forensic evidence sufficiently supported Johnson's story, no detailed blood or blood spatter analysis was performed at that time. The detectives, however, documented the entire crime scene with a camera and a video recorder.

Based on this evidence, the police department acquired a warrant to search the garage in which Richter had been living. The evidence found in the ensuing search further corroborated Johnson's story and **[972]** directly implicated Richter in the crime. In the garage, investigators discovered (among other things) Johnson's gun safe lying haphazardly on its back, two boxes and a drawer filled with CCI Stinger .22 caliber cartridges, and a magazine loaded with live CCI Stinger cartridges. A ballistics expert studied the .22 caliber bullet recovered from Klein's body and concluded that it was an exact match to the

CCI Stingers found in the garage. The expert also connected the spent .22 caliber casing in the living room to the magazine found in the garage: after analyzing the casing, the expert determined that it had been ejected from a High Standard Sport King handgun--the expert then examined Richter's magazine and concluded that it was a typical High Standard magazine designed specifically for a Sport King.

A warrant was issued for the arrest of Richter and Branscombe, and both were apprehended the following day. Although Richter first denied having any involvement in the crime and told the arresting officer that his truck was never at Johnson's house on the night in question, he eventually admitted that he and Branscombe had been at Johnson's house early on the morning of December 20th. He also admitted that Branscombe used a .32 caliber weapon to shoot Johnson twice and Klein once. Richter claimed, however, that he had nothing to do with the shootings--he said that he had stayed in his truck while Branscombe went into the house to return clothing belonging to Johnson's roommate. Richter asserted that he heard shots and screams in the house and entered to find Branscombe "freaked out" claiming that he had only shot Johnson and Klein after they attacked him.

Richter also confessed that he and Branscombe had taken Johnson's Cobray M-12 .380 caliber handgun with them to the Yolo overpass after the shootings, and had discarded it there along with Branscombe's .32 caliber weapon. An initial search of that area did not reveal either weapon. Detective Bell, however, did find a crisp $100 bill a few hundred yards away from the spot Richter had designated. One day later, Richter's counsel went back to the area and returned with the Cobray M-12, which he surrendered to the police.

Two additional statements implicated Richter. At the police station, Branscombe and Richter were interviewed regarding their involvement in the events in question. Both suspects were video-taped in a holding cell during a break in the interviews, and the recording revealed a statement by Branscombe implicating Richter in the crime. Branscombe asked Richter, "Did you tell them anything?," and Richter responded, "I just told them that I did not kill anyone, and da da da." Branscombe replied, "Joshua, we were going to tell them the truth." In the meantime, the police also interviewed Lauren Sullivan, Richter's girlfriend. Although she first refused to talk about the events in question, she eventually admitted that Richter had talked with her on the night of December 20th, approximately twelve or thirteen hours after the shootings. Sullivan never protested Richter's guilt at that time--instead, she told police ominously that she didn't think she should tell them about what Richter had told her. Richter's counsel knew of both statements.[1]

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[1] Although the videotaped statements of Branscombe and Richter were never admitted into evidence, their existence was an important aspect of the case that Richter's defense counsel had to consider. The prosecutor attempted to introduce the videotaped statements at trial during his cross-examination of Richter, but Richter denied ever making the statements. Because the defense successfully made an oral motion to exclude the videotape and transcription of its contents from trial, these statements were thus never admitted into evidence.

Nevertheless, these statements, as Richter acknowledged on direct appeal, were definitely inculpatory. *See People v. Branscombe*, 62 Cal. App. 4th 444, 64 Cal. App. 4th 807, 72 Cal. Rptr. 2d 773, 778-79 (Cal. Ct. App. 1998), review denied and ordered not to be officially published (Cal. 1998) (noting that Richter accused the prosecutor on appeal "of committing misconduct 'by asking appellant about a statement of his non-testifying co-defendant *which implicated appellant*.'" (emphasis added)).

[973]

B

On December 23, 1994, Richter was charged with murder (under Cal. Penal Code § 187) in the first degree (Cal. Penal Code § 190.2(a)(17)), attempted murder (Cal. Penal Code §§ 187, 664), burglary (Cal. Penal Code § 459), and robbery (Cal. Penal Code § 211). The trial began almost a year later, on November 14, 1995, and lasted nineteen days. Richter and Branscombe were tried jointly--Branscombe as the primary perpetrator, and Richter as a knowing accomplice. The jury was instructed on felony murder. Thus, as long as the jury believed that Branscombe shot Johnson and Klein in the perpetration of a robbery or burglary, and that Richter was an accomplice, Richter was also liable for murder. *See generally People v. Seaton*, 26 Cal. 4th 598, 110 Cal. Rptr. 2d 441, 28 P.3d 175 (Cal. 2001); *People v. Pulido*, 15 Cal. 4th 713, 63 Cal. Rptr. 2d 625, 936 P.2d 1235 (Cal. 1997).

Defense counsel faced enormous evidentiary obstacles at trial. Every known piece of forensic evidence either directly supported Johnson's account of the shootings or was inconclusive. The .22 caliber

CCI stinger bullets discovered in his client's garage decisively matched the bullet recovered from Klein's dead body. The $100 bill in the Yolo overpass, the positioning of Johnson's pager in the front yard, and the presence of Johnson's gun safe in his client's garage pointed strongly to his client's guilt. Moreover, his client's behavior after the shootings was hardly exemplary--Richter had fled the scene of the crime, thrown away evidence that might have implicated him in the murder, and upon arrest first denied ever being at the scene of the crime only to later recant this implausible story. There were even videotaped inculpatory statements that counsel would be forced to attempt to exclude from evidence. The only person who could cast doubt on his client's guilt was his client's girlfriend, who had previously told police that she had not talked with his client until approximately thirteen hours after the events in question, and thus could not credibly confirm Richter's whereabouts during the relevant time period. Finally, defense counsel knew that his client's co-defendant would not be able to testify credibly at trial--after observing Branscombe's odd behavior during an interview, counsel even suggested to Branscombe's attorney that an insanity defense might be productive.[2]

Counsel also faced significant procedural obstacles. The trial was somewhat of a hurried affair due to problems Branscombe's attorney had maintaining his bar membership. Because of past transgressions, Branscombe's attorney's bar membership was about to be suspended, and he wanted to finish the trial and collect his fee before the end of the year. Richter's counsel believed that the judge, because of this predicament, created an accelerated trial schedule that upset his plans to talk with the prosecutor and perhaps obtain a plea bargain.

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[2] In light of this situation, it gravely oversimplifies the case to assume, as the majority does, that the "factual dispute [over the source of the blood pool in the bedroom doorway] was the single most critical issue in the case . . . from the standpoint of the defense," Maj. Op. at 10680.

[974] Nevertheless, due to the State's perfunctory investigation of the crime scene, counsel knew that the existing forensic evidence did not necessarily prove his client's guilt beyond a reasonable doubt. Counsel knew that the homicide investigators had taken only six swabs of blood at the crime scene, had failed to do a comprehensive blood spatter analysis, and had never tested any of the blood samples they had gathered in the year prior to trial. Counsel also knew that police had never discovered the High Standard Sport King .22 caliber handgun that the ballistics analysis fingered as one of the murder weapons. Additionally, counsel knew that Johnson was not a victim likely to elicit empathy--he was a known drug dealer who had cut a deal with the State to testify against Richter in return for immunity from certain drug charges.

Understanding these limitations in the State's case, defense counsel diligently investigated evidence that could potentially exonerate his client. He hired a private investigator, James Pihl, who worked with Branscombe's attorney's private investigator, John Lee, to discover evidence not collected by the State. Counsel also interviewed a number of people who he had reason to believe might shed doubt on Johnson's story. Although this extensive investigation did not reveal much helpful evidence, counsel's investigator was able to discover that there were two bullet holes in Johnson's bedroom that were never analyzed by the police--one in a floorboard, and another in a wall. Counsel diligently notified the police investigators of the existence of these holes, which the State thereafter investigated. After examining the photographs and video of the crime scene, counsel was also able to pick out some anomalies in the State's case: for example, although Johnson claimed it was dark when he was shot, counsel noticed there was no blood on the living room light switch indicating that the wounded Johnson turned it on after being shot.

C

In the State's opening statement, the prosecutor mentioned nothing about serological, pathological, or blood spatter evidence that corroborated Johnson's story. There was good reason for this omission: the homicide investigators had neither collected much of the blood at the crime scene (they had taken only six swabs of blood) nor analyzed it in the year prior to trial. No blood sample was obtained from the large pool of blood in the bedroom doorway. In fact, the sample that is the focus of Richter's habeas petition was removed from the door molding a few inches above that blood pool. Before trial, the State had not even taken blood from Johnson with which to compare the blood stains in the house. Accordingly, the prosecutor focused on other physical evidence: the shell casings, the location of Johnson's gun safe, and the CCI Stinger cartridges found at Richter's residence.

Defense counsel's opening statement moved to exploit the State's evidentiary lapses. Counsel proclaimed that "evidence will . . . show that the subsequent investigation of the scene was quickly done and poorly orchestrated." He told the jury that "[t]he evidence of great importance is the lack of spatter marks [on the living room couch], and other pools of blood, and spatter marks found elsewhere in the house inconsistent with stories told by Gunner Johnson." Counsel explained that the crime scene photographs revealed that "there are no spatter marks of blood or anything on the couch" and that "there are also no marks on the sleeping bag [on which Klein was lying]." Counsel faulted the investigating officers for accepting Johnson's theory of the story and failing to "take swabs of the various blood marks **[975]** that were everywhere in that house and the pools of blood, including a pool of blood in the bedroom near the doorway of the bedroom, to determine whose blood that was, Mr. Johnson, Mr. Klein's, or another part[y's]."

Defense counsel framed a story "very, very different" from the prosecutor's account. He told the jury that Johnson was the aggressor, that Klein assisted him, and that Branscombe shot and killed the two in self-defense. Richter's counsel admitted that Branscombe had a .32 that evening, and that he used it. But Klein had also been shot with the .22 semiautomatic pistol that was never recovered. Counsel suggested that the .22 was Johnson's: his investigator had discovered a .22-caliber-sized hole in Johnson's bedroom floor that Johnson said he had made on another occasion. Counsel again returned to the State's sloppy investigation--there were .22

casings and shells stored in Johnson's bedroom that the State never tested to see if they were connected with the bullet that killed Klein.

According to defense counsel's theory, Richter and Branscombe, who had smoked marijuana with Johnson until around 2:00 am on the morning in question, returned to Johnson's house around 4:00 am to drop off some clothing and money for one of Johnson's roommates. Richter sat in his truck while Branscombe went up to the house. Counsel asserted that Klein let Branscombe into the house, but then immediately attacked him--grabbing Branscombe in the bedroom doorway while Johnson pulled out his M-12.[3] Luckily for Branscombe, Johnson's gun was not reliable and he only got off one shot before the gun jammed. But Johnson wasn't nicknamed "Gunner" for no reason--according to defense counsel, Johnson immediately pulled out a .22 caliber semiautomatic handgun to finish the job. Fortunately again for Branscombe, Johnson's talent with firearms failed to match his enthusiasm--he missed Branscombe and wounded Klein with the .22. This was just the advantage Branscombe needed. Branscombe pulled out his .32, gunned down Johnson, and then finished off Klein with a shot to the head. Richter, **[976]** hearing the gunshots, ran into the house to find Klein lying in a pool of blood in the bedroom doorway, Johnson twisted unnaturally on the bed, and Branscombe, "totally freaked out," standing in Johnson's bedroom holding a smoking .32. In a panic, Richter and Branscombe fled the scene to dispose of Johnson's M-12 and Branscombe's .32 at the deserted Yolo overpass.

Defense counsel argued that none of the evidence found by the police was inconsistent with Richter's story. Counsel asserted that Johnson secretly owned a .22 caliber semiautomatic handgun from which he could have shot the CCI Stinger, that Richter and Klein had just been paid for their work

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[3] Although the majority is correct that the defense's theory did not rest entirely on this admittedly "unlikely scenario," Maj. Op. at 10671 n.2, this theory was the one the defense would have preferred the jury believe. Richter's counsel was careful to give the jury multiple ways to find his client not guilty. Counsel, however, repeatedly suggested that Klein had attacked Branscombe. In his opening statement, counsel suggested that "Patrick Klein was involved in the altercation in the bedroom to the extent that he wrestled with Mr. Branscombe, and as he was wrestling with Mr. Branscombe after the first shots were fired, Gunner Johnson obtained gun number two." According to Richter's testimony, Branscombe believed that Klein was attacking him--Richter said that Branscombe had told him "that 'They tried to kill me.'" (emphasis added). Later, in his closing argument, defense counsel suggested once again that Klein was at least an agitator. He told the jury that although they did not have to believe that Klein was armed, they could believe Klein might have become "entangled" with Branscombe in such a way as to make Branscombe "think that [Klein] was an aggressor." Branscombe's attorney's closing statement made this point unambiguously: he told the jury, "I submit that there are several items of evidence in this trial that would indicate to you that *they* were trying to kill Chris Branscombe." (emphasis added). There was nothing erroneous about the defense's theory of the case in this regard. If Klein did not participate in the attack on Branscombe, Branscombe had no justification to shoot him at point blank range in the head. Of course, the defense did not require the jury to believe that Klein intended to kill Branscombe—Richter's counsel also argued that Branscombe might only have been guilty of manslaughter because Klein might simply have been caught accidentally in the middle of a shootout.

at a Christmas tree lot and lost the $100 bill while disposing of the guns, and most importantly that Johnson had free run of the house for at least forty minutes after the shootings and had manipulated any other evidence not consistent with Richter's story. Counsel avowed, for example, that Johnson had moved Klein from the bedroom doorway to the couch in order to make his story sound better. Finally, counsel claimed that Johnson's gun safe had been at Richter's residence for several months and that Johnson had invented this theft to implicate Richter.[4]

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[4] Although the defense argued at trial that Johnson's gun safe had always been in Richter's residence (where Johnson had previously stored several items), and presented several witnesses testifying such, the State also called several witnesses who testified that the gun safe was at Johnson's residence during the night in question. Fingerprint evidence was inconclusive in determining its provenance: police identified only Richter's fingerprints on the safe.

D

Counsel must have struck a nerve because the State moved quickly to shore up its case. The prosecutor, who realized for the first time that counsel would be articulating a theory of self-defense,[5] hurried to have the blood evidence analyzed to determine if it could be inconsistent with that theory. On the fourth day of trial, without prior warning, the prosecutor presented Bell, one of the homicide detectives, as an expert in blood spatter. The following day, the prosecutor for the first time obtained a blood sample from Johnson and had it compared with the six samples collected from the scene. Four days later, on the ninth day of trial, the prosecutor put Jill Spriggs, a criminalist, on the stand to testify about the results of that analysis. Defense counsel had been given notice of Spriggs's testimony only a day earlier.

The defense began presenting its case shortly thereafter. Counsel presented seven witnesses, including Richter. These witnesses focused primarily on the timing of the shooting and the location of the gun safe--they provided testimony indicating that the events in question occurred around 4:20 am, rather than 5:00 am, and argued that Johnson had been storing his gun safe at Richter's residence. Counsel did not call any expert witnesses to the stand. Although he considered doing so at certain points in the trial, counsel eventually decided that his cross-examination of the State's experts was sufficient to create reasonable doubt about the truth of Johnson's claims. The adequacy of this decision is the primary thrust of Richter's habeas petition.

II

In determining whether counsel's tactical decisions were so erroneous as to violate Richter's constitutional right to effective assistance of counsel, we face a truly [977] daunting standard of review. Under *Strickland*, a habeas petitioner may only prevail on a claim of ineffective assistance of counsel if he can show deficient representation "so serious

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[5] The defense team had only settled on this strategy shortly before trial. Previously, they had debated over a voluntary intoxication or insanity defense.

that counsel was not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The Supreme Court in *Strickland* refused to create a monolithic standard of acceptable attorney performance--instead, it recognized that courts must "indulge a strong presumption that a counsel's conduct falls within the *wide range* of reasonable professional assistance." *Id.* at 689 (emphasis added). The Court noted that "[t]here are countless ways to provide effective assistance in any given case" and observed that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* Thus, to find that counsel's conduct was deficient, we must override the "strong[ ] presum[ption] that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made." *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990).

Even if we are persuaded that counsel has engaged in "unprofessional errors," *Strickland* is not satisfied unless we can conclude that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This means "that counsel's errors [must be] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Of course, any newly introduced expert testimony might have changed the prosecution's approach at trial--but this is not enough to find prejudice under *Strickland*. *See id.* at 694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [or] that the errors 'impaired the presentation of the defense.'"). There is prejudice only if there is a reasonable probability that, but for the errors, the result of the proceedings would have been different.

Overlaying this inquiry is the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(2). Because this case is an appeal from a state court decision, we cannot simply make the findings required by *Strickland* and grant the petition. Rather, we must make a further finding: that our *Strickland* conclusion is itself so clear that the contrary judgment by the state court was unreasonable. In other words, we face a "doubly deferential" standard of review, *see Knowles v. Mirzayance*, 129 S. Ct. at 1420: we may not grant Richter habeas relief unless we are convinced that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). In cases like these, where no state court has explained its reasoning, we must conduct "an independent review of the record to determine whether the state court's decision was objectively unreasonable." *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006). "Objectively unreasonable" does not mean that we can grant the habeas petition if we merely disagree with the state court's decision, or would have decided oppositely in the first instance. *See Williams v. Taylor*, 529 U.S. 362, 409, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2003) ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Nor can we decide that a state court was unreasonable even if we believe it committed a clear error. *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). **[978]** Rather, to overturn the state court's decision, its judgment about counsel's performance must be so egregious that we cannot but be convinced that the court's decision is itself outside the bounds of reasonableness.

Deference under AEDPA is especially important in this case, where Richter's claims arise under *Strickland*. The Supreme Court has emphasized that "evaluating whether a rule application was un-reasonable [under AEDPA] requires considering the rule's specificity." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). "The more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations." *Id. Strickland* is a general rule, as the Supreme Court has often recognized. *See, e.g., Mirzayance*, 129 S. Ct. at 1420. The Court has made plain that "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.*

The majority recites these standards, but doesn't take them to heart. The majority glosses over the circumstances in which defense counsel found himself: all the forensic evidence discovered be-fore trial implicated his client in the crime; his client's actions in response to the crime were indicative of guilt; he was fighting a judge and fellow defense attorney who wanted to finish the trial as quickly as possible; and he was surprised by expert witness testimony from witnesses the State had not previously identified. The majority also ignores the nature of the expert testimony at issue: despite the bombastic language of Richter's newfound experts, the content of their testimony is not as revealing as Richter claims.

A careful review of the record demonstrates the inadequacy of the majority's conclusions. Richter's counsel vigorously pursued the strategy he had developed in his opening statement and diligently contested all critical evidence raised by the prosecution. In no sense, then, can we conclude that "counsel was not functioning as the 'counsel' guaranteed [Richter] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Even if we could conclude, with the benefit of hindsight, that defense counsel made certain mistakes in his representation of Richter, these mistakes are not the type of egregious errors that mandate a finding of deficient performance. At worst, counsel exhibited questionable judgment by relying exclusively on his own powers of cross-examination in lieu of an expert's direct testimony. And even if counsel's judgment was flawed, it is far from clear that counsel's decision not to call these experts resulted in an unreliable guilty verdict. Although the expert declarations offered in support of Richter's habeas petition might have added some new tools to the defense's arsenal, they can hardly dent the clear, unchallenged evidence implicating Richter in Klein's murder and the utter lack of evidence (even in Richter's newfound expert testimony) confirming or even strongly supporting Richter's theory of self-defense.

Finally, even if we could conclude, as a matter of first impression, that defense counsel failed to meet the standard of professional conduct mandated by *Strickland*, there is clearly not enough evidence in the record to conclude that a state court adjudicating oppositely has made not just an erroneous but a patently unreasonable decision. To rule otherwise is to ignore the clear congressional intent in AEDPA to curtail our second-guessing of state court habeas decisions. *See Williams*, 529 U.S. at 386 (Opinion of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) ("[I]t seems clear that Congress intended **[979]** federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ.").

A

The majority first claims that defense counsel's decision not to consult with or call as a witness a serologist was deficient and probably prejudiced Richter's defense. In its haste to paint with broad brush strokes, the majority decides this without even a cursory discussion of the circumstances of that decision or the nature of the relevant evidence. Review of counsel's decision and the serology evidence in context indicates that counsel's decision not to "investigate" serology evidence before trial was reasonable and consistent with his trial strategy. Moreover, even if counsel's failure to procure a serologist constituted deficient performance, it had a nearly negligible effect on the course of trial.

The State had to plug the holes Richter's counsel identified in its case. It had neglected to test the blood pool in the doorway to Johnson's bedroom to see whether it was Johnson's blood (as the State contended[6]) or Klein's blood (as the defense claimed at trial[7]). The only sample the State had was a swab taken from the wall just above the blood pool. At trial, the State's expert, Jill Spriggs, testified regarding her comparative analysis of Johnson's blood sample and the swabbed sample. Because both Johnson and Klein had Type O blood, their blood samples had to be differentiated by reference to an enzyme, phosphoglucomutase ("PGM"). Spriggs opined that her laboratory testing determined that Johnson's PGM subtype was 2+1+ and that Klein's PGM subtype was 1+. Spriggs claimed that because the blood found on the molding near the blood pool had a PGM sub-type of 2+1+, Klein could reliably be excluded as the donor of that blood.

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[6] The State's theory was essentially that Johnson created the blood pool when he stood wounded by the bedroom doorway waiting for Richter and Branscombe to drive away.

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[7] Defense counsel's theory was that Klein wrestled with Branscombe at or near the bed-room doorway, that Johnson shot at the struggling Branscombe from near his bed, and that Johnson missed Branscombe and hit Klein. This fortuitous accident freed Branscombe from Klein's grip, and Branscombe then shot Klein in the head, which caused Klein to collapse in the bedroom doorway.

This was the first defense counsel had heard of this evidence. In fact, counsel had learned of the subject matter of Spriggs's testimony only the day before her appearance in court. Spriggs had not been on the prosecution's witness list, and her forensic tests were run mid-trial. After learning of Spriggs's testimony, counsel immediately requested a continuance, which the trial court denied. At that point, counsel had to move quickly to counter this unexpected development. He called the public defender's office and then spent the evening in a library learning about PGM sub-types while preparing for cross-examination.

During cross-examination, counsel challenged Spriggs's conclusion that Klein could be reliably excluded as the source of the blood swabbed from the bedroom wall. In response to counsel's questions, Spriggs acknowledged that she had not tested for cross-contamination and that she had only been able to run one test. Counsel asked Spriggs whether she could testify to a "scientific certainty" that the sample only contained one person's blood. She answered equivocally that "it does not look like there are two people contributing to that stain."

[980] Counsel also questioned whether a commingling of Johnson's and Klein's blood would still produce a 2+1+ sample and whether a degraded sample would reliably indicate PGM subtype at all. Spriggs, in response to this line of questions, eventually opined that if commingling between a 2+1+ sample and a 1+ sample occurred, the test would reveal a stronger 1+ result than what had occurred in this case. Counsel attempted to challenge this conclusion, questioning Spriggs about what would result if the proportion of blood contributed by the two donors was different, but he was cut off by the judge. Nevertheless, counsel was able to secure an admission from Spriggs that if Johnson and Klein's blood were combined in the sample, the PGM subtype would show a 2+1+ band, and that the test might not reveal a stronger 1+ result (indicating the presence of Klein's blood) if the sample was degraded.

Now, to support his habeas petition, Richter attaches the expert opinions of two serologists who make nearly the same points that counsel presented on cross-examination.[8] One expert, John Thornton, speculates that because "in the electrophoretic separation of PGM subtypes, the 1+ band in a 2+1+ sample appears at the same location as the 1+ band in a 1+ sample," the Spriggs finding "could not exclude the possibility that the sample contains a mixture of 2+1+ and 1+ blood." The other expert, Brian Wraxall, remarks that there is a possibility that Klein could have been a contributing source because "the relative intensity between the 2+ band and the 1+ band in the [wall] sample would depend on the proportion of Mr. Klein's blood commingled with Mr. Johnson's blood." Also, Wraxall points out that even a non-degraded sample might show a 2+1+ result of uniform intensity where Johnson's enzyme tested as a strong 2+ band and a weaker 1+ band. Wraxall had to qualify this opinion because "the 2+ band in a 2+1+ band is *usually, but not always*, equal in intensity to the 1+ band" (emphasis added) and no evidence at trial indicated whether Johnson's blood would create a stronger 2+ band.

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[8] I should note that, although the majority trusts Richter's experts as authoritative, both experts filed only very short affidavits containing their preliminary views and indicating their availability to testify. Neither expert had access to the blood samples, and neither has actually testified or been tested by cross-examination.

Richter's professed experts do not challenge Spriggs's conclusion that the blood pool contained Johnson's blood. They also cannot establish that Klein's blood is in fact in the sample, or even that it is likely that Klein's blood is in the sample. At best they can only challenge the conclusion that evidence shows conclusively that the swabbed sample contained Johnson's blood only--a conclusion that Richter's counsel effectively challenged at trial during cross-examination.

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With all due respect to our colleagues, counsel's performance was well within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In no way was Richter deprived of competent counsel in the sense that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Counsel did what he could under extremely difficult circumstances. While the majority excoriates defense counsel for failing to "consult" with a serologist or other forensic expert in preparation for trial, it fails to acknowledge that the results of such "consultation" are pure speculation and have no basis in the record. **[981]** Although the Certificate of Appealability in this case listed "[w]hether trial counsel rendered ineffective assistance in violation of the Sixth Amendment by failing to investigate, develop, and present [expert testimony]" as one of the issues to be considered on appeal, both the habeas petition filed in the district court and the evidence presented in support of that petition focus entirely on counsel's "fail[ure] to *present* readily available expert testimony which directly supported his theory of the case." (emphasis [*111] added). The expert witness declarations proffered in support of the petition do not indicate that any of Richter's new experts would have been available to advise counsel about his trial strategy. In each declaration, the expert only avers that he "would have been available to testify to this *if called as a witness* at Mr. Richter's trial." (emphasis added). Not one expert declaration asserts a witness's availability before trial to "consult" with defense counsel.

More importantly, nothing in the record hints that defense counsel would have been better prepared to address serology testimony at trial had he retained a serologist at the outset. Both of Richter's serology declarations are reactive--they respond to specific points made by the State's expert during trial. Neither declaration details any type of advice the serologists would have given defense counsel before trial, when neither counsel nor anyone else knew that the State would be presenting expert testimony on blood evidence.[9] Indeed, before trial neither counsel nor the State knew if the State's limited blood evidence was still viable--it had been collected over a year in advance and may not have been well preserved. Thus, prior to trial, a serologist could have given defense counsel only general background knowledge about serology: no serologist could have "prepared" defense counsel to address the specific weaknesses in the State's case, which only were revealed after Spriggs's testimony.

Likewise, it is absurd to suggest, as the majority does, that counsel would have altered his trial strategy after consulting with a serologist before trial. Counsel had good reasons to refrain from having the State's blood samples tested, and these reasons would not have been challenged by an advisory serologist. Counsel knew that a major weakness in the State's case was the lack of serological evidence eliminating Klein as a potential source of blood pools in the bedroom and the bedroom doorway, and he knew that the homicide detectives had never taken a sample directly from the blood pool in the bedroom doorway or tested the blood samples they did possess. Given these circumstances, counsel had two options before trial: he could ask the State to do a comparative analysis of the blood samples, or he could wait and see whether the State planned on testing the samples itself. An analysis of the possible **[982]** outcomes of each strategy

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[9] The record shows that it was not "entirely predictable" that "[t]he State would present forensic testimony" on serology or any other type of blood evidence, Maj. Op. at 10688 n.10. Indeed, even the State did not expect to introduce such testimony before defense counsel's opening statement, and had to scramble to collect the evidence during trial. At that juncture, the State didn't even know whether it had usable blood samples.

On this point the majority apparently "agree[s] with the dissent that counsel's decision not to ask the prosecution to test the blood sample . . . was not unreasonable." Maj. Op. at 10685 n.9. If so, the majority has created a duty to consult with experts that counsel did not intend to call as witnesses. Retaining a serologist before trial would only have "prepared" counsel by preventing him from having to search for an expert on short notice: but if this failure to prepare is constitutionally deficient, the first prong of *Strickland* becomes a nullity--no counsel can possibly retain an expert to respond to every single potential expert a prosecutor might muster.

demonstrates that counsel's decision to wait on the State's investigation was actually quite shrewd.

If counsel had "investigated" and asked the State to test the blood samples, he very well could have (and in this case would have) aided the State in producing inculpatory evidence against his client. There were only three potential outcomes to a serology test, and only one of them would have been helpful to his client. If the test showed that the blood sample matched Johnson's blood, counsel's self-defense theory would have collapsed. If the test showed a match with Klein's blood, counsel's case would have been strengthened. Finally, if the test was inconclusive, counsel was no better off than he would have been had the test never been attempted. All the evidence counsel had at the time indicated that it was highly unlikely that a test would result in the second outcome. Not one piece of forensic evidence discovered at the crime scene corroborated counsel's self-defense theory, and counsel had no reason to think that the blood evidence would be any different--in fact, counsel knew that Richter and Branscombe had made videotaped inculpatory statements while in police custody.[10]

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[10] The Supreme Court has emphasized that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. The Court has noted that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigative decisions." *Id.* Although in this case such conversations are privileged, the circumstances of the case are such that counsel could have reasonably believed his client was involved in the shootings and that they were not in self-defense. Thus, we cannot simply assume, as the majority implicitly does, that counsel should act as he would if he believed his client was

not involved in the shootings--we must recognize that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.*

Given the low probability that a serology test would aid his client, and the high probability that it might foreclose entirely his theory of self-defense, it was quite reasonable for counsel to forgo such testing and force the State to analyze the blood on its own initiative. In this way, counsel would gain the same benefits of a positive test and yet also retain more maneuverability at trial. If the State didn't bother to test the blood, or found that the samples were too degraded to create a conclusive result, counsel could ridicule the State for its inadequate investigatory processes and imply that other forensic evidence at the scene was not conclusive. Moreover, if the State decided independently to test the blood samples and found potentially exculpatory evidence, it would be required by law to disclose the result to defense counsel. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Of course, the State might test the blood and find an adverse result--but in that case defense counsel would be no worse off than were he to have requested the test himself.

To be sure, counsel's decision to rely on the State's failure to present expert evidence was in some aspects riskier than the majority's preferred strategy. If the blood evidence was exculpatory, his decision not to test the samples could have prevented the jury from having such evidence to consider. But the existence of this remote possibility is no reason to deride counsel's decision as unreasonable. Counsel, who could talk frankly with his client and discuss whether "pursuing certain investigations would be fruitless and **[983]** even harmful," knew more about the risks involved with either strategy than any judges on this court. *See Strickland*, 466 U.S. at 691 ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."). Thus, at best the majority can claim that counsel's decision to wait for the State's blood analysis was riskier than its preferred strategy--and the Constitution, unlike the majority, does not mandate risk-averse representation. *See id.* at 689 ("Any such set of rules [restricting the range of legitimate decisions regarding how best to present a criminal defense] would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.").

Counsel's actions during trial, in response to the State's expert testimony, were also quite reasonable. Although counsel might have retained a standby serologist to "consult" with during trial (as the majority strangely holds was obligatory), he had a list of the State's witnesses and knew the State was not putting on any evidence about the blood pool. After learning that the State was adding a witness, counsel first sought a continuance. When the court refused, he spent time researching the subject matter to determine the evidence's strengths and weaknesses. Even with his limited research, counsel's questions on cross-examination were thoughtful, informed, and probing. There is no evidence of inadequate preparation or other professional misconduct in his cross-examination. Counsel realized that he was not as competent as a hypothetical expert to examine the serology evidence, and prepared a list of potential expert witnesses to contact. After his cross-examination of Spriggs, however, counsel believed that he had created the possibility of reasonable doubt so as to preclude the necessity of tracking down his own expert witness (who he had no reason to believe at the time would interpret the serology evidence any differently than the State's expert[11]).

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[11] As previously discussed, counsel had good reason to believe that his client was involved in the shootings. He had no reason to believe that further investigation into the serology evidence would reveal exculpatory information.

In hindsight, the decision not to obtain a serologist even at this late stage in the trial might have been a tactical error. The prosecutor ridiculed counsel's decision in his closing argument, proclaiming, "I am not going to worry about Jill Spriggs because, hey, her seven years as a biochemist and a criminalist . . . doesn't mean anything, because I am a lawyer . . . . But I am not going to pay and bring in an expert to show you." Also, counsel missed two potential weaknesses in Spriggs's testimony--he failed to question her sufficiently about whether a sample containing different proportions of Johnson and Klein's blood could produce a 2+1+ result without a stronger 1+ band, and did not raise the possibility that Johnson's blood might naturally produce a stronger 2+ band and a weaker 1+ band such that a combination of Johnson and Klein's blood would create a uniform 2+1+ result.[12]

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[12] It is important to note that although it is possible that Johnson's blood might naturally produce a stronger 2+

> band and a weaker 1+ band, none of Richter's professed experts can confirm this hypothesis. Thus, although Richter's experts raise more hypothetical situations than did counsel on cross-examination in which a combination of Johnson and Klein's blood would create Spriggs's result, they are still merely hypothetical and have no basis in the actual facts of the case.

Such errors may be obvious to us, but only because we know to a "scientific certainty" that Richter's defense failed. **[984]** Counsel had no such commodious perspective on his case. And the standard by which the majority is judging counsel in this case is so demanding that in the future no counsel, having failed to defend his client successfully in a contested trial, will be immune from our withering scrutiny.

We have previously acknowledged that the failure to call an expert does not always constitute deficient performance for purposes of *Strickland*. In *Duncan v. Ornoski*, 528 F.3d 1222 (9th Cir. 2008), we recognized that "it may not be necessary in every instance to consult with or present the testimony of an expert." 528 F.3d 1222, 1235. We concluded there that because the serology evidence was "pivotal" and because counsel clearly demonstrated a lack of expertise in serology, it was deficient for him to fail to consult with an serology expert and to rest on his cross examination of the State's expert. Counsel in this case, however, behaved far more responsibly than counsel in *Duncan*. In *Duncan*, counsel "demonstrated his lack of expertise in serology at the outset of his cross-examination of the State's serology expert when he told him, 'You lost me.'" *Id.* Indeed, counsel in that case "did not even know what serology was," and began questioning the State's serologist about hair evidence. *Id.* at 1235-36.

Here, unlike in *Duncan*, counsel was inexperienced with blood analyses but not uninformed. He spent an entire evening studying the topic before his cross-examination and asked probing and relevant questions of the State's expert. After his cross-examination of the State's expert, counsel made an informed decision that a serology expert would not add significantly to his case, which from the outset focused on holes in the State's investigation. Even nearly fourteen years after the trial, during his deposition in this case, counsel was able to talk intelligently about the serology evidence and its flaws. Moreover, the experts procured by Richter in support of his habeas petition make the same type of objections to the State's expert testimony that counsel made on cross-examination--all deal with hypothetical situations in which a 2+1+ result might not conclusively exclude Klein as a potential donor to the blood sample.

Also, unlike in *Duncan*, we are not engaged in *de novo* review of the state court's decision. *Duncan* arose under the pre-AEDPA regime, thus, there we "review[ed] the district court's decision to deny habeas relief," and petitioner's "ineffective assistance of counsel claims," *de novo*. 528 F.3d at 1232-33. Under AEDPA, we cannot simply compare this case to the facts of *Duncan* to determine whether to grant Richter's petition--we must determine whether the California courts' decisions about the serology evidence were unreasonable in light of Supreme Court holdings.

The majority stretches the general rule of *Strickland* beyond any case the Supreme Court has decided. If counsel in this case can be said to have unreasonably rendered deficient performance in failing to use a serologist at trial, almost no counsel in the future can satisfy *Strickland* without first consulting with every conceivably relevant expert before trial and then calling these experts at trial to testify on any contested forensic issue. No matter what counsel thinks about the efficiency of paying expert witness fees to duplicate his own research on a topic, he is remiss to fail to pay them. Time pressure, financial pressure, trial strategy--it doesn't matter: the majority essentially rules, "even when not in doubt, call an expert."[13]

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[13] The breadth of the majority's holding is truly astonishing. According to the majority, no counsel can reasonably make the decision to not call an expert to the stand until he has consulted with said expert and determined that the expert's testimony would not be helpful to his case. Because this reasoning simply ignores the fact that the decision to consult with an expert is a strategic decision in its own right, and that the Supreme Court has upheld the ability of counsel to make strategic judgments after reasonable investigation, *Wiggins*, 539 U.S. at 533, it promises to open the floodgates for habeas petitions in the Western United States based on the lack of expert testimony at trial.

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2

Although defense counsel did not perform deficiently in deciding not to call an expert--to, as counsel put it, "sprinkle more holy water" on points made during cross-examination--even assuming deficient performance, I doubt that prejudice resulted. As the Sixth Circuit has held, "the modest difference between the jury hearing [a] theory of defense through cross-examination and hearing it through the mouth of another expert" is not enough to establish prejudice under *Strickland*. *Tinsley v. Million*, 399 F.3d 796, 806 (6th Cir. 2005). Although perhaps an expert witness could have articulated the flaws in the prosecution's serology evidence more eloquently and provided an opportunity for the defense to bolster its theory through repetition, it is clear that more is required to find that there is a "reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

There is no reason to think that the defense would have been able to present better expert witness testimony at trial than the expert affidavits filed in support of Richter's habeas petition. Yet neither of these expert declarations presents significantly better objections than those articulated by defense counsel on cross-examination. Any expert testimony would have provided little new information to the jury--instead, it would have simply reinforced counsel's cross-examination, indicating that the 2+1+ result did not preclude a conclusion that the blood sample was a mixture of Johnson and Klein's blood, and therefore there was a "possibility" that Klein's blood was also in the sample. As it was, Richter's counsel argued that Spriggs did not "demonstrate actual knowledge about what really goes on in there when there is degradation, a whole year[']s worth of sample." He added, "Nor did she have particular knowledge of what happened when two kinds of bloods are combined." The majority cannot (and thus does not attempt to) explain why we should assume that the jury would have credited an expert's enunciation of that theory when it obviously rejected defense counsel's.

The majority simply misses the point when it claims that because Spriggs "adhered strongly" to her hypothesis that the blood came only from Johnson, Maj. Op. at 10704 n.21, the lack of Richter's newfound serology testimony was prejudicial. The State's expert would most certainly not have broken down on the stand and dramatically admitted error even if defense counsel had introduced directly contradictory expert testimony of his own. The question thus is not whether the expert testimony would have "cast" the State's expert testimony "into doubt," Maj. Op. at 10705--defense counsel's cross examination did that. The question is whether the expert testimony would have added appreciably to the defense's attempts to undermine the State's expert. Besides noting that the testimony came from an expert, rather than a lawyer, the majority has not put forward any evidence to support its answer of this question in the affirmative.

Moreover, the expert testimony at issue, even if introduced at trial, is not conclusive enough to significantly weaken the prosecution's theory. The proffered testimony says only that it is possible that the blood **[986]** sample was a mixture of the two victims' blood--it does not indicate the probability that such a mixture would create the laboratory result in this case. At best, the declarations contest Spriggs's conclusion that the blood sample was exclusively Johnson's. The declarations are carefully worded to say that Spriggs's results cannot exclude Klein as an additional source of the blood pool. The declarations do not support the theory the defense would have liked to have shown: that Klein was the source of the blood pool. For that conclusion, the PGM subtype of the blood sample would have had to have been a 1+, and it was not. Thus, the totality of the serology evidence strongly supports the State's theory, that the blood pool was Johnson's. All that Richter can claim is that there is a possibility that the blood pool contained both Johnson's and Klein's blood.

Unfortunately for Richter, neither expert cites any evidence to support a conclusion that these theoretical possibilities are at all probable in this case. As the panel found, "[b]ecause these expert reports do not foreclose the likelihood that the blood from the blood sample came exclusively from Johnson, they do not impeach Johnson's testimony that the blood came from him alone." *Richter v. Hickman*, 521 F.3d 1222, 1231 (9th Cir. 2008). Especially given the significant amount of other forensic evidence supporting the prosecution's theory, and the general implausibility of Richter's story, *see infra* Part II.D, it is absurd to assume that evidence about the "possibility" of blood mixing would have convinced the jury that Richter's recollection of the events of December 20th was nearly as compelling as Johnson's.

3

Once we put the AEDPA overlay on top of *Strickland*, our task becomes even easier. Even if I am wrong, and counsel's performance was both objectively deficient and prejudicial, the matter is surely open to debate and discussion. If so, the

California courts were not unreasonable to reject Richter's claims of ineffective assistance of counsel. Nothing in *Strickland* or any other decision of the Supreme Court should have alerted the California courts that they were making a colossal error in judgment, one on which reasonable jurists could not disagree. *See Mirzayance*, 129 S. Ct. at 1420.

B

For similar reasons, defense counsel's decision not to consult a forensic pathologist was clearly not prejudicial. Richter's habeas petition contains the declaration of a pathologist, Dr. Paul Herrmann, who would have been able to testify that the prosecution's theory about the creation of the blood pool in the bedroom doorway was "scientifically unreliable." The majority asserts that this testimony, in combination with that of the other expert witnesses, would have seriously undermined the State's case. A closer investigation of the pathologist's hypothetical testimony, however, reveals the fallacy of this conclusion. Indeed, much of the pathologist's testimony is pure speculation not based on his specialized knowledge or experience and could have been excluded at trial for that reason; his only "expert" analysis does not preclude the State's theory; and all of his observations merely parrot defense counsel's statements at trial.

Many of the assertions in Herrmann's declaration could have been properly excluded by the trial court as having no evidentiary value. *See People v. Richardson*, 43 Cal. 4th 959, 77 Cal. Rptr. 3d 163, 183 P.3d 1146, 1179 (Cal. 2008). Herrmann opines that because nothing in Johnson's testimony indicates that he was standing in the bedroom doorway for an amount of time necessary to create a pool of blood of the necessary magnitude, the prosecution's **[987]** theory to the contrary is unreliable. Additionally, Herrmann concludes that the treating physician's testimony about Johnson's shoulder wound "does not support the State's theory because the amount of blood likely to result from such a wound would have been minimal." Notably, Herrmann does not specify the scientific basis for either of these bare conclusions. He does not even assert that these conclusions are based on his experience or specialized knowledge of forensic pathology. California courts have excluded expert opinions for these very failings. *See, e.g.*, *Jennings v. Palomar Pomerado Health Sys., Inc.*, 114 Cal. App. 4th 1108, 8 Cal. Rptr. 3d 363, 369 (Cal. Ct. App. 2003) ("[A]n expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury.").

Likewise, the only opinions in the pathologist's declaration based on his "experience" are too speculative to be admissible. Although Herrmann admits that he had access to photographs of Johnson's wounds, he does not base his conclusions on this evidence, but on testimony offered at trial, which he did not attend. Moreover, he gets a number of material facts wrong. Herrmann claims that the investigating officer did not notice that Johnson was injured until a few minutes after arriving at the crime scene and opines that "[g]iven my experience, if Mr. Johnson had been bleeding so profusely as to have deposited the pool of blood on the floor between the living room and the bedroom, it is unlikely that Detective Wright would have been oblivious to the injury." In offering this opinion, he ignores Detective Wright's testimony that Johnson was soaked in blood when he arrived at the house: Johnson had "blood on both cheeks, blood covering his shirt, and blood on his hands, and . . . on his right shoulder." He also fails to account for photographic evidence that Johnson bled enough to create a significant blood pool in the kitchen during the few minutes he talked with the detectives. Finally, Herrmann's declaration ignores Detective Wright's testimony indicating that one reason the detective did not believe Johnson was injured was because Johnson originally claimed that he was not hurt. *See Richardson*, 183 P.3d at 1179 ("[An] expert's opinion may not be based on assumptions of fact without evidentiary support, or on speculative or conjectural factors." (internal quotation marks and alterations omitted)).

Even if by some serendipitous occurrence these conclusory and speculative assertions were not summarily excluded by the trial court,[14] they are too weak to significantly contradict the State's theory. Herrmann's declaration is careful to conclude that the State's theory is "unlikely"--not that it is impossible. In fact, it **[988]** was not only possible that Johnson bled enough to create a pool of blood in the doorway, but consistent with other evidence admitted at trial. Photos taken of the crime scene several hours later established that there was a sizable blood pool in the kitchen area created by Johnson while he talked with Detective Wright in the few minutes before the ambulance arrived--a fact that the prosecutor hammered home in his closing statement.

More importantly, the pathologist's hypothetical testimony is simply a repetition of the defense's overarching theory, echoed by defense counsel throughout trial, that Johnson was shot around 4:20 am rather than 5:00 am and otherwise could not have had time to dispose of his marijuana plants and create blood trails throughout the house. For example, during his cross-examination of Detective Wright, defense counsel pressed, "And it wasn't until after you had located [Johnson] in the kitchen area that you first entertained a belief that he had, in fact, suffered a wound; is that right?" The jury had full knowledge of the defense's theory and could do with it what it pleased. The majority proffers no reason that having a pathologist repeat what defense counsel harped on during trial would be at all consequential to the jury's decisionmaking--especially when the pathologist's opinion is not

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[14] The majority's assertion that such an objection to the prejudicial effect of the expert declarations was waived before the district court, *see* Maj. Op. at 10697 n.15 & 10705-06 n.23, is based on a misreading of the parties' stipulations. In support of his habeas petition before the district court, Richter submitted declarations for his experts in lieu of direct testimony, and the parties stipulated that "the previously submitted declarations of petitioners' expert witnesses are admissible for consideration on the merits, and that [the experts], if called to testify, would testify in accordance with their declarations." In contrast to the majority's assertion, this stipulation narrowly waives only an objection to the admissibility of the declarations in the district court in lieu of direct testimony for the purposes of considering Richter's habeas petition. It does not clearly waive any objection to the prejudicial effect of the content of the declarations based on their admissibility in state court at trial. Indeed, determining the admissibility of Richter's expert declarations at trial is one aspect of a "consideration [of the testimony] on the merits."

supported by any explicit medical or scientific basis and could have been excluded for that reason.

The majority thus illogically concludes that defense counsel rendered ineffective assistance by failing to consult with and call to the stand an expert whose testimony would have been redundant, utterly unpersuasive, discredited by readily available forensic evidence, and most likely inadmissible. Indeed, it concludes that a state court adjudicating otherwise has been unreasonable. This is beyond overreaching.

C

What the majority calls the "most damaging" aspect of counsel's performance, his decision not to consult with a blood spatter expert, is actually the most understandable. Counsel had good reason for failing to consult with a blood spatter expert--he learned only minutes before the State's blood spatter expert's testimony that anyone would be opining on such matters. Moreover, counsel's failure to consult with a blood spatter expert was far less damaging than the majority admits. For these reasons, even if counsel was not flawless in his approach to the blood spatter testimony, his performance did not rise to the level of unconstitutional deficiency, and in any event, the testimony he could have elicited through his own expert would not have contradicted the State's case.

1

Before trial, counsel had no reason to know that an expert in bloodstain pattern interpretation would be helpful to his defense. Indeed, in his deposition he clearly confirmed that although he considered consulting a serologist before trial, he did not even consider consulting a blood spatter expert until after the State's expert had testified. Counsel's approach was not unreasonable.[15]

[989] Counsel was not put on notice by the pre-trial actions of the prosecutor that such an expert would be necessary. Bell, the homicide detective who would testify about blood spatter for the prosecution, was not denominated as an expert on the subject prior to trial. Counsel never received a report from the prosecutor prior to Detective Bell's testimony giving the basis for his testimony, outlining the subject matter of his testimony, or providing any indication of his expertise in bloodstain pattern interpretation. When counsel--quite responsibly--asked the court for a report prior to Detective Bell's testimony concerning its subject matter, the judge flatly refused.

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[15] Contrary to the majority's assertions, the Sixth Amendment does not require defense counsel to "consult" with any and every potentially helpful expert in preparation for trial. Instead, *Strickland* makes clear that only an "unreasonable" investigation is constitutionally deficient. 466 U.S. at 690-91 ("Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). The Supreme Court has never suggested, as the majority does, that anything less than a "scorched-earth" investigative strategy is constitutionally deficient. Instead, the Court has long recognized that counsel should have the ability to weigh the potential value of investigation with the cost of acquiring it. *See Wiggins*, 539 U.S. at 533 ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant."). Where counsel has no reason to believe, and should have no reason to believe, that a certain type of expert witness would be helpful to his case, it is not unreasonable for him to fail to "consult" with the expert either before, during, or after trial.

Counsel's opening statement neither revealed counsel's knowledge of the importance of expert blood spatter testimony nor promised the jury that he would call a blood spatter expert. Although counsel did, in his opening statement, advise the jury of the significance of blood spatter evidence, he also indicated precisely what bloodstain pattern evidence he believed supported his theory--none of which remotely required an expert to interpret. Counsel noted in his opening statement that "[t]he evidence of great importance is the *lack* of spatter marks in this area, and [the lack] of other pools of blood, and spatter marks found elsewhere in the house inconsistent with stories told by Gunner Johnson." (emphasis added). He explained further that photographs of the crime scene would show that "there are no spatter marks of blood or anything on the couch;" that there were no blood marks on the sleeping bag on which Klein was purportedly sleeping; that there was a large pool of blood in the bedroom doorway that was never analyzed by the police; and that although Johnson claimed that he turned the lights on after being shot by Branscombe, there was no blood on the light switch. Not only did counsel elicit testimony establishing each one of these propositions during the course of the trial, he reiterated their significance in his closing statement.

Thus, because counsel was hardly remiss for failing to call a blood spatter expert to testify about the significance of the absence of blood spatters or pools of blood in certain areas of the house, the only possible "promise" counsel failed to honor was his pronouncement that the pool of blood (not blood spatters) in the bedroom doorway was "inconsistent with stories told by Gunner Johnson." But, as counsel testified in his deposition, he had no reason to know before trial that the absence of small blood spatters surrounding this pool of blood would be significant in determining its source. Indeed, although there were "spatters" surrounding the pool that might ordinarily have alerted experienced counsel to the importance of a bloodstain analysis, these spatters were in this case created by a "foot stomp"--some unknown person had stepped into the middle of the blood pool and splashed portions of it on the bedroom wall and door. This was not enough to alert an attorney of counsel's experience to the importance of a blood spatter expert before trial.

During trial, counsel diligently responded to the prosecution's expert's testimony. He first objected to the testimony and asked that it be excluded, claiming that it was proffered too late. He also asked for **[990]** a preliminary facts hearing and for a copy of Detective Bell's qualifications regarding blood spatter, but the court denied both requests. Although counsel does not remember asking for a continuance, it is highly unlikely, given the tenor of the trial and counsel's other experience with such requests, that one would have been granted.

Once the prosecution's expert, Detective Bell, had testified, counsel "considered [exploring] testimony relating [to] atomized blood droppings in the area of Mr. Klein's head on the couch relating also to whether or not this could have been caused by a sneezing, coughing, choking of the person on the telephone that was somewhat adjacent thereto." He also considered whether it was necessary to call an expert to testify concerning the various blood spatters in Johnson's bedroom. In both cases, he waited until after his cross-examination of the prosecution's expert, and then determined that neither expert would be profitable to his defense. This judgment appears to have been correct--Richter has failed to obtain in support of his petition a single expert who would contradict Detective Bell's opinion about the origin of these spatter marks, or who would indicate that defense counsel's theory about the origin of these spatter marks is even "possible."

Even after Detective Bell's blood spatter testimony, counsel had no reason to know that an expert would be helpful to determine whether the blood pool in the bedroom doorway came from Klein or Johnson. Detective Bell did not testify at all about blood spatter surrounding the pool--he testified about blood patterns and spatter on Klein's body and in other areas of the crime scene. Counsel might have been alerted to the fact that a blood spatter expert might have been helpful in general, but he had no reason to believe that blood spatter testimony would definitively indicate that either Klein or Johnson created the blood pool. Indeed, counsel had good reason to believe that a blood spatter expert would not be able to confirm his client's story--all the evidence so far presented at trial (and generally known to counsel) suggested that pursuing such an investigation would be fruitless. *See supra* Part II.A at n.7.

In sum, although counsel's response to the blood spatter expert's testimony was unlike his more reasonable response to the serologist's testimony--he did not independently research bloodstain pat-tern science nor know enough about the subject to evaluate whether his cross-examination of the State's expert was sufficiently effective--it was not so egregious to constitute ineffective assistance of counsel. By the time the blood spatter expert had testified, the trial was well underway. Counsel had to weigh the potential value of such an expert with the cost of acquiring one mid-trial. Taking time out of his trial preparation to find and retain a blood spatter expert who he had no reason to believe would disagree with the State's expert or be able to opine on the source of the blood pool is not plainly an error in judgment. Even if, with the benefit of hindsight, it was not a prudent decision, it was certainly not constitutionally deficient. At the very least, it was reasonable for California courts to consider counsel's choice not deficient.

2

Even if counsel made the wrong call, in light of the existing forensic evidence and the implausibility of Richter's story it is far from clear that Richter was prejudiced. The majority confidently proclaims that the testimony of Richter's newfound blood spatter expert, Ken Moses, would have created reasonable doubt as to Richter's complicity in Klein's murder. But this proclamation ignores the unchallenged blood spatter evidence at trial that directly undermined the defense's entire case.

[991] Specifically, Detective Bell opined that several important aspects of the blood evidence found at the scene were consistent with Johnson's recollection that Klein was shot at or around the living room couch rather than in the bedroom doorway. First, the blood flow patterns on Klein's face indicated that he was probably not moved 'up or down' after he was shot in his left eye. More specifically, the blood from Klein's left eye wound emanated from his ocular cavity and flowed only down the left side of his face. If Klein had been moved from a different position, his head could not have been leaned (even slightly) back or forward during this movement, or otherwise the blood would have flowed down toward his chin or up toward his hairline. Second, a small area of high velocity blood spatter (spatter created by an impact of tremendous force) was visible beside the living room couch. Bell opined that because he was unaware of any other action besides a gunshot wound that could have created such high velocity spatter, either Klein or another unknown person had to have been shot on or slightly above the couch. Finally, Bell testified that because the blood pool in the doorway was "pristine" and did not exhibit any "smearing" of blood, a person shot there would have had to be "lifted straight up" from the pool, which was unlikely. Richter's newfound expert fails to contradict any of these propositions. *See* Maj. Op. at 10702 n.18 ("The most damaging evidence at trial was Detective Bell's blood spatter evidence.")

Thus, for the forensic evidence to be consistent with Richter's story, the drug-addled, intoxicated, 5'10", 155 pound Johnson would have had to perform an athletic feat of nearly Olympic proportions to move Klein from the bedroom doorway to the couch.[16] According to Detective Bell's testimony, Johnson would have had to lift the 6'1", 166 pound Klein "like a baby in [his] arms with [his] head parallel with the axis of [his] body" and carry him in precisely this position across the room, over a coffee table, and onto the couch. Johnson could not have dragged Klein even a short ways from the blood pool--he had to lift him "straight up."

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[16] Johnson was not only seriously wounded, but somewhat intoxicated (his blood alcohol level was 0.024) and probably under the influence of marijuana.

More importantly, for the forensic evidence to be consistent with Richter's story, some other person would have had to have been shot at or near the couch--a proposition that is entirely inconsistent with both Richter's recollection of the events in question and the evidence presented at trial. Richter did not testify that he saw a third wounded person on or near the couch. No additional shell casings were discovered in the living room that did not correspond to either Johnson's or Klein's wounds. Neither the State nor defense counsel offered any witnesses who claimed that another unknown person was in the house on the morning of December 20th. After fifteen years, no witnesses have materialized either to admit to being in Johnson's residence during the night in question or to report on a newly disinterred corpse with at least one bullet wound.

Given the utter lack of evidence indicating that a third person was shot at Johnson's residence, the totality of the State's and Richter's blood spatter testimony leads to only one possibility: Klein was shot on or near the couch. This scenario is entirely inconsistent with Richter's story, which required Johnson to shoot the struggling Branscombe and Klein from a position near his bed.[17] *See* Maj. Op. at **[992]** 10698 ("If Klein was killed while lying on the couch in the living room, there was no possibility that Richter's account was correct.").

Although Richter's newfound expert testimony opining about the lack of small satellite spatters in the area of the doorway blood pool may have weakened Johnson's already scattered account of the shootings, it would not have been enough to render plausible Richter's contrary account. Richter's blood spatter expert opines that "the blood pattern [in the bedroom doorway] was caused by the pooling of blood from a source close to or lying on the floor." This opinion is not inconsistent with the theory that the blood pool came from Johnson--instead, it means only that the blood couldn't have originated from Johnson while he was standing up.

Richter, even after several years of foraging for expert testimony to reinforce his theory, has been unable to discover a single expert to contradict Detective Bell's testimony that someone had to be shot within a few feet of the couch. At trial, defense counsel argued that the high velocity blood spatter near the couch was created when Johnson sneezed or coughed blood while talking on the nearby phone. Not surprisingly, Richter's habeas petition lacks any expert declaration confirming this assertion that Johnson could cough blood with the force of a semi-automatic. Likewise, although the majority takes it upon itself to discredit Detective Bell's testimony concerning Johnson's movement of Klein, Richter has not produced any expert testimony disputing Detective Bell's conclusions in this regard.

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[17] The uncontradicted testimony of a ballistics expert indicated that Klein was shot with the .22 caliber bullet from between 11 and 22 inches away. Because Johnson's bedroom was more than 22 inches away from the couch, Johnson could only have shot the .22 caliber bullet that wounded Klein if Klein was shot in the bedroom doorway.

In sum, unlike Richter's blood spatter testimony, which only contradicts Johnson's recollection of the events, the State's blood spatter testimony contradicts the defense's entire case because it establishes that Johnson could not have physically shot Klein. The State's blood spatter testimony has never been challenged--even Richter's new blood spatter expert cannot contradict the State's blood spatter evidence.[18] Because the State's case was not predicated on the fact that Johnson stood up while making the blood pool in the doorway, Richter's testimony only discredits Johnson's account of the events. In contrast, the defense's entire case was predicated on Johnson having the ability to shoot Klein with a .22 while Klein was struggling with Branscombe, and this theory is entirely discredited by the State's blood spatter testimony.

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[18] Because Richter did not present any blood spatter evidence in his habeas petition that if presented at trial would have directly contradicted the State's expert, we cannot assume, as the majority does, that the jury would have been forced to choose between the experts, *see* Maj. Op. at 10699-10700 n.16. Instead, we must consider whether the totality of the non-contradictory blood spatter evidence would have created reasonable doubt of Richter's guilt.

Because of the unchallenged forensic evidence directly contradicting Richter's entire case, it was thus likely correct, and certainly not unreasonable, for a state court to assume that no prejudice resulted from defense counsel's failure to obtain the expert blood spatter testimony.

D

As the majority recognizes, *Strickland* requires us to "consider the totality of the evidence before the judge or jury" when making a prejudice determination, 466 U.S. at 695. But this inquiry does not merely encompass the evidence claimed by the habeas petitioner to be infected with error--it also should include a consideration of "factual findings . . . **[993]** unaffected by the errors." *Id.* We must thus "[t]ak[e] the unaffected findings as a given" and ask, "taking due account of the effect of the errors on the remaining findings," whether "the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696. The Supreme Court cautioned in *Strickland* that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* In this case, the State's case was solid, but not overwhelming. The unaffected factual evidence before the jury, however, provides substantial support for its guilty verdict. Indeed, Richter and Branscombe's story not only has so many holes that it is unbelievable, but uncontradicted expert testimony about the forensic evidence found at the crime scene further implicates the duo. Certainly, given these implausibilities and forensic evidence, we cannot say that a California court finding that Richter's hypothetical expert testimony was not prejudicial was unreasonable in so doing.

In order to believe Richter and Branscombe's story, the jury first had to assume that Johnson was simultaneously savvy and stupid. The jury had to believe that Johnson was intelligent enough to do the following things after being shot in the shoulder and head by Branscombe: (1) take the .22 caliber semi-automatic handgun (that only Richter claimed Johnson owned) and bury it where no subsequent investigation would unveil it; (2) move the .22 caliber casing from his bedroom to the living room to implicate Richter in Klein's death;[19] (3) find his hip sack and any remaining CCI Stinger .22 caliber ammunition and bury it with the .22 caliber gun in order to make the scene consistent with a robbery; (4) throw his pager out his front door onto the lawn to make it look like Branscombe and Richter had taken his hip sack; and (5) lift Klein carefully from the bedroom doorway and move him to the couch to make it look like he was shot in his sleep. Despite this careful scheme, the jury also had to believe that Johnson was so stupid as to (1) move Klein, rather than leaving him exactly where he was shot, and simply tell the police that Klein was coming to Johnson's aid when he was gunned down in the bedroom doorway; (2) throw his marijuana plants and drug paraphernalia over his fence into his neighbor's yard, in plain view, instead of hiding them with the .22 handgun, the CCI Stinger ammunition, and the hip sack; (3) wait nearly forty minutes planning his story before calling the police, only to tell them three potentially inconsistent stories about what happened;[20] and (4) tell the police specifically that he did not ever see Richter holding a gun in his bedroom, when he had already manipulated the crime scene to implicate Richter.

To believe Richter's story, the jury also had to overcome uncontradicted, unchallenged forensic evidence corroborating Johnson's story. The prosecution's blood spatter expert testified that the blood flow patterns on Klein's face indicated that he **[994]** was not shot in the bedroom door-way; there was high velocity blood spatter in the area of the couch that could only have resulted from a gunshot wound; and there was no evidence of bruising or blood spattering on Klein's face consistent with him being shot, falling, and making an impact with the bedroom floor. In short, for Richter's account of the shootings to be at all consistent with the State's uncontradicted expert testimony, the jury would have had to either invent a third wounded person at the crime scene whose existence was neither asserted by the parties nor suggested by the evidence at trial, or assume without any evidentiary or scientific support

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[19] Although the State's expert testified that the location of bullet casings were not entirely indicative of the location of the shooter, he also testified that it would be highly improbable that a gun fired in the bedroom would release a casing in such a way as to bounce out the bedroom door, leap over Klein's body, and come to rest in the corner of the living room.

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[20] Because the defense's theory rested on the assumption that Johnson deftly manipulated all the forensic evidence inconsistent with Richter's story, the fact that Johnson failed to complete the effort by telling a police a consistent story was a major problem for the defense, as the prosecutor repeatedly pointed out in his closing argument.

that Johnson coughed blood at a velocity of approximately 1000 meters per second.

Finally, to credit Richter's version of the events, the jury had to believe that several highly improbable events occurred. The jury had to believe that (1) Richter and Branscombe left Johnson's house around 2:00 am to return to their workplace at the Christmas tree lot because they suddenly felt motivated to clean up their work area; (2) Richter and Branscombe returned to Johnson's house at 4:00 am to give Johnson's roommate his pay and clothing from the Christmas tree lot, rather than waiting until the next morning; (3) upon the duo's return to Johnson's residence, Johnson and Klein were so intoxicated or drugged that they attacked Branscombe (who they had just smoked marijuana with a few hours before) for no reason;[21] (4) Klein, who had let Branscombe into John-son's residence minutes earlier, initiated an attack on Branscombe with sufficient force that Branscombe felt justified in pulling out his .32 in self-defense; (5) Johnson, who had a perfectly good .22 caliber semi-automatic handgun, would first attempt to shoot Branscombe with his Cobray M-12, which was allegedly prone to jamming; (6) the M-12 immediately jammed after Johnson fired one shot, even though it functioned normally when tested later; (7) Johnson, a firearms enthusiast possessing the element of surprise, first fired his M-12 nearly straight into his bedroom floor, then missed hitting Branscombe with his .22 semi-automatic handgun from around twenty inches away; (8) Richter coincidentally had ammunition and a magazine at his residence that perfectly matched the .22 caliber casing found at the crime scene; (9) Richter and Branscombe ran off to the Yolo overpass to immediately dispose of the weapons even though they believed they were innocent; (10) Richter and Branscombe just happened to have several $100 bills, one of which happened to fall out while they were disposing of the guns in the Yolo overpass; (11) Richter and Branscombe avoided calling the police for a day and a half after the shootings, even though they learned shortly thereafter that the police were investigating Johnson's house; (12) Richter initially denied ever being at Johnson's house, even though he believed he was innocent; and (13) after an exhaustive search of the Yolo overpass in the area where Richter told the police the weapons had been thrown, no weapons were found, but the very next day, defense counsel returned to the overpass **[995]** and found only Johnson's weapon, the M-12, and not the potentially incriminating .32 that Richter and Branscombe remembered discarding in the very same spot.

Given the utter implausibility of Richter's story, and the general plausibility of Johnson's, it stretches the very meaning of prejudice to claim, as the majority does, that counsel's failure to pro-duce

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[21] The majority misunderstands the defense's theory when it claims that Johnson's intoxication can "explain why, in his befuddled state, not recognizing Branscombe, he shot what appeared to be an intruder when he awoke and saw an unknown person unexpectedly in his house," Maj. Op. at 10701. It was quite important to the defense to suggest that Johnson and Klein were not asleep when Branscombe entered the house, so that it could be proposed that Branscombe did not enter the house without their consent. Thus, in his closing statement defense counsel proclaimed, "Christian Branscombe *did not surprise anybody*, did not go running in the dark and start shooting. It didn't happen that way." (emphasis added).

expert testimony that would at best contradict the prosecution's experts and Johnson on some minor points is enough to sustain Richter's burden of proving prejudice. Even if we could conclude as a matter of first impression that, in the face of such odds, the unproduced expert opinions might have persuaded a jury that Richter could not be guilty beyond a reasonable doubt, it is condescending to conclude that California state courts adjudicating otherwise have made an unreasonable decision under AEDPA.

III

The majority today grants Richter's request for a do-over. The temptation to grant such a request is great in a contested case of "who shot whom first" when the evidence is either circumstantial or based on the eyewitness accounts of the participants. The temptation is particularly alluring when we know what trial counsel could not: that his defense is not going to work. But our post-hoc clairvoyance cannot diminish the fact that Richter's counsel presented a coherent, viable defense. The majority's perceived "deficiencies" in counsel's preparation ignore counsel's real-time dilemmas--the trial court, the prosecution, his limited resources and, most importantly, his client. We face none of those challenges. No trial will ever be perfect; no counsel complete in his preparation. Richter's counsel, even if not perfect, was diligent in his preparation and vigorous in his defense. I would conclude that there was no *Strickland* error and, *a fortiori*, no grounds for us to grant the writ under AEDPA.

I respectfully dissent.

OPPOSITION BRIEF

(3)

No. 09-587

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

KELLY HARRINGTON,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF IN OPPOSITION

◆

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QUESTION PRESENTED

Is certiorari appropriate where the en banc court held that a defense lawyer violates the Sixth Amendment right to the effective assistance of counsel when he completely fails to investigate or present readily available forensic evidence directly supporting the theory of defense he himself selected and relied on throughout trial?

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STATEMENT OF THE CASE

The Case Presented At Trial.

In the early morning of December 20, 1994, a shooting occurred at 4620 Fair Oaks Boulevard in Sacramento, California. One person – Patrick Klein – was killed while another – Joshua Johnson – was injured. When police arrived, they found Klein lying on a sleeping bag on the living room couch and a large blood pool in the bedroom doorway. This blood pool would play a critical role in the case.

The state charged respondent Joshua Richter and co-defendant Christian Branscombe with murder and attempted murder. As the district court noted, the parties presented "divergent theories" of the shooting. Petitioner's Appendix ("Pet. App.") 27a.

According to the state, defendants went to Fair Oaks Boulevard to commit a robbery, shot Klein as he slept on the couch and shot Johnson when he awoke. There were three components essential to the state's theory: (1) Klein was shot while sleeping on the couch, (2) the blood pool police found in the doorway came from Johnson as he waited for police, and (3) Johnson did not initiate a gun battle by shooting at Branscombe. The state's case was based largely on the testimony of Johnson.

Johnson first told the 911 operator there were four or five assailants. RT 577, 686-87.[1] He then changed his story and said there were three to four assailants. RT 577, 686-87. Still later, he told police there was one assailant. RT 946. Finally, Johnson said it was Richter and Branscombe who shot Klein as he slept on the couch and then Johnson in the bedroom. RT 507, 510. Johnson never explained why he initially failed to identify the defendants, both of whom he knew well. And although Johnson admitted he had a .380 caliber gun that night by his bedside, he testified he did not fire it. RT 511, 590.

In an extensive opening statement defense counsel outlined the very different defense theory. According to counsel, defendants went to Fair Oaks Boulevard to return a gun Branscombe borrowed. Richter dropped Branscombe off and, moments later, heard shooting. Rushing into the house, Richter saw Klein on the floor in the bedroom doorway, while Branscombe yelled that Johnson tried to shoot him. There were three components essential to the defense theory: (1) Klein was *not* shot on the couch while sleeping but in the bedroom doorway during a gun battle, (2) the blood pool in the doorway was *not* from Johnson, but from Klein before Johnson carried him to the couch, and (3) Johnson fired a .380 caliber gun at Branscombe who returned fire in self-defense. The defense case was based largely on the testimony of Richter himself. RT 1087-91.

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[1] "RT" refers to the Reporter's Transcript of Proceedings prepared in connection with the state court appeal. "ER" refers to the Excerpt of Record filed in the Court of Appeals.

Given these two inconsistent versions of events, the blood pool was a critical piece of evidence. The en banc court noted this precise point:

> If Klein was killed while lying on the couch in the living room, there was no possibility Richter's account was correct. If, in contrast, Klein was killed in the doorway to the bedroom, Johnson's account of the events in question could not possibly be true.

Pet. App. 125a.

Defense counsel noted the same point. In his opening statement he specifically focused the jury on the key evidence in the case. He promised the jurors the evidence would show "Patrick Klein was not shot there on the couch;" he focused their attention on "pools of blood" that were "inconsistent with the stories told by Gunner Johnson." ER 134-35. He told jurors the blood pool was "the evidence of great importance." ER 135. He promised the jury "the evidence will show that . . . Johnson after Patrick was shot moved him to the couch" and explained "[t]he evidence will show you that in the bedroom there is a pool of blood right in the entrance [to the bedroom]. . . . There is also a trail of blood from there to the couch." ER 138, 142. In his closing argument, defense counsel argued the same theory to the jury: the blood pool proved not only that Johnson was lying, but that Klein had been caught in a cross-fire after Johnson fired at Branscombe. RT 1510-12.

It should have been easy to resolve this stark conflict as to who deposited the blood by testing a sample taken from the pool. Yet although police noted the "fair amount of blood" in the pool, they never collected any of it. RT 937. Thus, the genetic source of that blood could not be established by scientific tests. RT 937.

Instead, the state called a blood spatter expert. Prosecution witness Bob Bell looked at photographs of the crime scene which he admitted were "lacking" because they were "dark and not clear." RT 156. When asked if he saw "any spatter that would be consistent with Patrick Klein having been shot on the couch" Bell responded "[n]ot much, but there was some," particularly blood spatter near the couch which "may" have been caused by Klein being shot on the couch. RT 148, 150. Bell conceded there was no blood spatter on the sleeping bag or couch itself. RT 162, 183-84. In closing, the prosecutor argued Klein was shot on the couch; the blood pool was deposited by Johnson dripping blood as he stood in the bedroom doorway waiting for police to arrive. ER 178.

Although defense counsel recognized the importance of the blood pool evidence in opening statements, in contrast to the prosecutor he neither consulted with nor called a blood spatter expert. In closing argument, the prosecutor accurately noted that defense counsel had introduced no expert testimony to support his theory that the blood pool proved Klein was shot in the bedroom:

> Bob Bell, he's 22 years as a blood spatter expert, all that stuff means nothing. Hey [defense counsel] says, the blood be here. Bob Bell, he's wrong, trust me. I am not going to go get an expert. I am not going to bring some-body in here to tell you because I don't need to do it. I will just do it in closing argument. I will just say it. If you are willing to believe me, hey, that will work.

Pet. App. 122a.

As important as the blood pool was, it was not the only key part of the defense case. As noted, the defense theory was that Branscombe fired only because Johnson had first fired a .380 caliber bullet at Branscombe. At trial, defense counsel introduced no physical evidence to show that there was a bullet hole at the crime scene consistent with a .380 caliber gun being fired that night. The prosecutor again ridiculed the defense for failing to present physical evidence to support its theory:

> [The defense theory is that] Johnson actually was the one who shot off the [.380 caliber] in the house. There is no bullet hole that can be found. . . .
>
> [I]t's reasonable with a guy with a [.380 caliber] semi automatic to get off at least one round if somebody is trying, if he's trying to shoot someone, and we never ever saw a bullet hole in this room consistent with the

> [.380 caliber] being fired at them. There is nothing, nothing over here, nothing. . . .

ER 171, 176.

Even on this record, the jury obviously viewed the case as close. Although the state presented testimony from an actual eyewitness, the jury had concerns, deliberating more than 14 hours over three days, twice returning with requests to have testimony re-read, and three times asking for further clarification on the law.

As post-conviction investigation revealed, however, the jury did not have the whole story, or anything close. Through a combination of false testimony and suppression of evidence by police, the failure to correct that testimony by the prosecutor, and a failure to investigate by defense counsel, there was significant – and now undisputed – physical evidence to support each part of the defense theory.

The New Evidence.

As noted, the defense theory was that Johnson fired a .380 caliber gun at Branscombe that night, starting the fight which caused Klein's death. The state powerfully relied on the fact that there was no physical evidence to support the notion that Johnson fired a .380 caliber bullet that night. ER 171, 176.

There is no longer any dispute the state's argument was false. It turns out investigating officer Maloney found a bullet hole in the floor of Johnson's bedroom. ER 158. He cut a square of the floorboard around the bullet hole, then watched the square fall into the crawlspace beneath the house. ER 159. Under oath, Maloney testified (1) the crawlspace was inaccessible, (2) the floorboard was lost and (3) the bullet hole was not from a .380 caliber gun. ER 158-61. Johnson himself confirmed this testimony, explaining that the bullet hole was caused weeks earlier when he accidentally fired a .22 caliber gun into the floor. ER 153, 155.

Maloney's testimony was false, as was Johnson's. The uncontradicted evidence shows that the crawlspace was *not* inaccessible. The back of the house had a readily accessible opening to the crawlspace. ER 31-33, 46-48. After trial, the crawlspace was discovered, and the floorboard was recovered and provided to ballistics expert James Aiello. ER 32-33, 63. Aiello obtained a second piece of floorboard from the house to use as a control, test-fired five different caliber bullets into the floorboard (including a .380 caliber) and compared measurements from the control floorboard with measurements from the evidentiary floorboard. ER 63-64. His conclusion was stark; as the district court noted, "the bullet hole was made by a .380 caliber bullet." ER 14. In other words, this physical evidence directly supported the defense case and showed Johnson was lying. In district court the state did not cross-examine Aiello, nor did it even proffer any contrary testimony; instead, the state stipulated to his unrebutted expert testimony. ER 399.

But the .380 caliber bullet hole was not the only unrebutted expert testimony presented in post-conviction proceedings. As is now clear, the state's theory that the blood pool in the bedroom doorway came from Johnson is false. And the explanation is both logical and simple. According to blood spatter expert Ken Moses, a standing person dripping blood into blood (as the state theorized) would create a large number of round splash drops – known as satellite drops – surrounding the main pool of blood as blood dropped into the blood pool. ER 82-83. The lack of satellite drops here shows that the state's theory as to the source of the blood pool – that it was deposited by Johnson while standing in the doorway dripping into the blood pool – was false. ER 82-83. To the contrary, the absence of satellite drops establishes the blood pool was caused *not* by drops falling from an injured person standing in the doorway, but by the pooling of blood from a source close to or on the floor. ER 82-83. Moses's conclusion was straightforward:

> The lack of a large number of satellite dropletts (sic) surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing in[ ] the doorway dripping into the pool below.

Again the state did not dispute this expert testimony. Thus, the state did not cross-examine Moses, nor did it offer any contrary testimony. Instead, the state stipulated to this unrebutted expert testimony as well. ER 399.[2]

Because of Maloney's false testimony about the crawlspace, the jury never learned that, in fact, the physical evidence directly supported the defense theory that Johnson fired his .380 caliber that night. Nor did the jury learn that Johnson lied about how the bullet hole got in the floor. Moreover, because defense counsel did not consult a blood spatter expert, the jury did not hear uncontradicted forensic evidence that Johnson could *not* have been the source for the blood pool as the state claimed. Indeed, the district court itself noted that this evidence – never disputed by the state – proved that "the pool of blood . . . could not have been made by someone standing and dripping blood." Pet. App. 39a.

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[2] While it is certainly unusual for the state not to challenge defense experts in a habeas case, the state had good reason to stipulate to Moses's expert testimony here. At trial, Bob Bell (the state's own expert) – while testifying about some blood drops in the kitchen – himself recognized that when "[w]hen you have blood dripping into blood, you have small satellite spatter that occurs. . . ." RT 139. *Accord* RT 177 ("that may be satellite spatter from blood dripping into blood which gives you those smaller drops of blood."). In other words, Bell agreed with the scientific basis for Moses's testimony.

But even this is not all. The expert medical testimony of pathologist Dr. Paul Hermann, confirming Moses's conclusion, was also undisputed below. According to Dr. Hermann, given the nature of Johnson's wounds, and Johnson's own description of his frenetic activities in the six minutes before police arrived, it is "highly unlikely" Johnson deposited the amount of blood found in the blood pool. ER 71-72.

Defense Counsel's Explanations.

Based on his post-conviction investigation, Richter sought collateral relief in state court. He contended the state violated Due Process in presenting false evidence that the floorboard was lost and in failing to disclose the floorboard itself. He also contended that defense counsel rendered ineffective assistance of counsel in failing to uncover the floorboard on his own as well as in failing to investigate and present the other forensic evidence supporting the defense he himself had elected to present to the jury, including the blood spatter, pathology and ballistics experts. Richter presented his claims to the state supreme court in a state habeas petition, asking for an evidentiary hearing and discovery. The state court denied the petition in a one-line order which read, in its entirety, "Petition for writ of habeas corpus is DENIED."

Richter then sought habeas relief in federal court. The district court ordered a deposition of trial counsel. The parties stipulated the deposition would be submitted in lieu of live testimony. ER 399.

In light of the theory he elected to present, Richter's trial counsel recognized "[i]t was significant to try to show that [the blood pool] was at least partially the other gentleman's blood, meaning Klein's blood." ER 283. Had Klein's blood been in the doorway, "[i]t would have gone a long way to impeach the testimony of Mr. Johnson" and would have corroborated Richter's testimony. ER 283-84. But counsel conceded he did not consult a blood spatter or pathology expert before or during trial. ER 245. Counsel was frank; he gave no tactical reason for his failure, he simply did not consider such experts and was unaware such testimony could be obtained. ER 289-92.

The Federal Court Proceedings.

The district court rejected Richter's Due Process claim based on the state's presentation of false evidence and argument as to the "lost" .380 caliber bullet hole, ruling that defense counsel could have disbelieved Maloney and "sen[t] someone out to the house to check to an entrance to the crawl space." ER 403. With respect to the claim that counsel erred in failing to investigate the bullet hole, the court found that counsel had "no reason to believe the hole was anything but what the investigators had found." Pet. App. 42a. Although the court recognized counsel was mistaken – because the bullet hole was really from a .380 caliber – it held the mistake reasonable. Pet. App. 43a.

Turning to the claim that defense counsel erred in failing to support his own theory by consulting blood spatter and pathology experts, the district court properly found that trial counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." Pet. App. 39a. Inexplicably, the court relied on this fact to find that counsel's failure to investigate and present blood spatter and pathology testimony which directly supported the defense theory was reasonable. *Ibid*. The district court did not address the prejudice component of this issue. Pet. App. 44a.

A three-judge panel affirmed. As to the Due Process claim based on the state's suppression of evidence and presentation of false evidence, the panel noted (1) there was an easily accessible crawlspace beneath the house and (2) the floorboard was retrieved during post-conviction proceedings and a "firearms evidence expert . . . determined that the hole was probably caused by a .380 caliber firearm. . . ." Pet. App. 75a. The panel correctly recognized this evidence directly supported the defense theory, contradicted Johnson's testimony and had "exculpatory value." Pet. App. 76a, 77a.

Nevertheless, the panel rejected respondent's Due Process claim, refusing to consider the exculpatory value of the floorboard because police did not know about Aiello's testing when the evidence was suppressed. Pet. App. 77a. *But see United States v. Bagley*, 473 U.S. 667, 683 (1985) (in evaluating Due Process claims involving suppressed evidence, reviewing courts must consider not just the evidence suppressed itself, but "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case."). The panel also rejected Richter's alternative ineffective assistance of counsel claim because "Maloney testified under oath at trial that the floorboard was inaccessible, and [defense counsel] had no reason to disbelieve him." Pet. App. 76a. In other words, it was reasonable for defense counsel not to investigate the floorboard because the state's investigating officer told him it would not help. *But see Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003) (unreasonable for criminal defense lawyer to forego investigation based on "the investigative work of the State.").

The panel also rejected Richter's claim that the failure to present blood spatter testimony regarding the blood pool was ineffective. Although "[c]ounsel highly experienced in trying capital cases involving bloodstain evidence might well have understood the value of such an expert" the "Sixth Amendment does not guarantee defendants a right to highly experienced counsel." Pet. App. 73a. Accordingly, counsel's failure to support the theory he himself relied on throughout his case was reasonable. *But see Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (in penalty phase, defense counsel promised jury evidence regarding defendant's difficult life but failed to investigate or present such a defense; held, *Strickland* violated.). Like the district court, the panel never addressed whether the failure to present this evidence was harmless. Pet. App. 73a.

The Circuit granted en banc review in connection with each of these holdings. In a 7-4 decision, the en banc court found defense counsel's failure to investigate the blood spatter evidence constituted ineffective assistance of counsel. With respect to the performance prong, the court eschewed a broad rule requiring defense counsel to consult an expert in every case or on every issue. Pet. App. 104a, n.7. Instead, the court made clear this case involved an analysis of forensic evidence which was critical to support the theory counsel himself had affirmatively decided to present. *Id.* at 103a-104a. Because this case involved counsel's failure to "support the theory he had chosen," the state's decision to present expert blood spatter evidence in the middle of trial "has no bearing upon the relative importance of the source of the pool to the defense's theory of the case." *Id.* at 103a-104a and n.6. Counsel's obligation "to provide crucial – indeed potentially outcome-determinative – corroboration" for the defense theory did not depend on "whether or not the prosecution presented any expert testimony about the pool of blood. . . ." *Id.* at 112a. Relying on cases from throughout the country, the en banc panel squarely rejected the district court's view that the failure to investigate the defense theory of the case was somehow rendered reasonable "because counsel thought that the case was, at bottom, a credibility contest." *Id.* at 113a. Accurately noting that defense counsel himself offered no strategic reason for failing to consult with a blood spatter expert, the court refused to invent such a reason for him. *Id.* at 115a.

The court then turned to prejudice in connection with the blood spatter evidence. As noted above, neither the district court nor the panel ever addressed prejudice because both rejected defendant's claim by finding counsel's failure reasonable. The en banc court noted that if the blood pool was from Klein the state's version of events could not possibly be true. *Id.* at 125a. Similarly, if the blood pool was from Johnson, Richter's version could not be true. *Id.* at 125a. Because the state had neither cross-examined Moses, nor presented any contrary evidence, Moses's conclusion "remains undisputed," "conclusively refuted the prosecution's theory" and would have impeached Johnson's credibility "on a central point." *Id.* at 126a-127a. The court also noted Johnson's shifting versions of events given to police. *Id.* at 128a. Finding counsel's failure to investigate the blood spatter evidence prejudicial, the en banc court did not reach the Due Process claims involving Maloney's lie about the crawlspace and suppression of the .380 caliber bullet hole or the alternative ineffective assistance of counsel claim based on counsel's failure to investigate and present the bullet hole in the "lost" floorboard.

The State's Petition for Certiorari.

In its Petition for Certiorari, the state mischaracterizes the panel and en banc decisions as they relate to the blood evidence at trial. Petition for Writ of Certiorari at 3, 8. The state presents the two decisions as having turned on defense counsel's separate failure to offer a serology expert to testify that blood typing of blood found on a molding near the blood pool could not have excluded Klein. However, both decisions recognized it was the blood spatter evidence, not the serology evidence, that was at the heart of the case.

The three-judge panel discussed separately the blood spatter evidence (*see* Pet. App. 72a-73a) – a discussion that is entirely ignored in the state's description of that decision. More important, the en banc court stated explicitly it was the blood spatter evidence that was "[m]ost significant, and most damaging to the prosecution" and acknowledged that "[t]aken by itself, the failure to present expert testimony on [serology] did not sufficiently prejudice the defense such that habeas relief would be warranted." Pet. App. 123a, 133a, n.20. The serology evidence was relevant simply because it reinforced the reasonable doubt created by the blood spatter evidence had both been presented at trial. As the en banc court explained, "[w]hile it would not have been unreasonable for the state court to conclude that, by itself, the failure to present serology evidence was not prejudicial, the absence of that expert testimony contributed to the prejudice that resulted from the failure to offer expert blood spatter testimony." *Id.* at 134a. In short, the blood spatter evidence should not be confused with the serology evidence; the issue here is whether certiorari is appropriate in connection with the en banc court's holding that counsel was ineffective for failing to investigate and present the blood spatter evidence, not the serology evidence.

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REASONS FOR DENYING THE WRIT

I. THE EN BANC COURT'S UNREMARKABLE CONCLUSION THAT COUNSEL ACTS UNREASONABLY WHEN HE FAILS TO INVESTIGATE THE THEORY OF DEFENSE HE HIMSELF (1) SELECTS, (2) PROMISES TO THE JURY IN OPENING STATEMENT, (3) CALLS HIS CLIENT TO SUPPORT AND (4) RELIES ON IN CLOSING ARGUMENT DOES NOT MERIT CERTIORARI.

When a criminal defendant seeks relief because his counsel has provided inadequate representation, two elements must be proven: (1) counsel's performance fell below an "objective standard of reasonableness," and (2) but for counsel's errors there is a "reasonable probability" the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 693 (1984). Here, the en banc court held that defense counsel's failure to investigate and present unrebutted blood spatter evidence showing the blood pool was deposited by Klein fell below the *Strickland* standard.

The state urges this Court to grant certiorari for three reasons. First, the state expresses concern with the court's application of the performance prong of *Strickland*. According to the state, certiorari is appropriate because the decision "in effect laid down a per se rule requiring counsel to investigate and to produce expert-opinion testimony" and "improperly enlarged counsel's duty to investigate to include consultation with and presentation of an expert in virtually every case in which the prosecution could conceivably offer expert relevant forensic testimony." Petition for Writ of Certiorari at 15-16. Second, the state suggests that the finding of deficient performance is "untenable" because it failed to recognize that counsel here believed his client was guilty, and therefore the normal duties of investigation did not apply. Petition for Writ of Certiorari at 17-20. Finally, the state argues that in any event, the decision was not suitably deferential to the state court's one-line order denying both a hearing and relief in state court because, after all, "the blood evidence was hardly crucial to the defense case." Petition for Writ of Certiorari at 22.

As more fully discussed below, the case for certiorari which the state describes ignores the record in this case almost entirely. This was not a decision involving a "per se rule" requiring experts in every case. This was a case where trial counsel selected a defense based on using the blood pool and physical evidence to prove Klein was shot in the bedroom, promised that defense to the jury in his opening statement, called his client to present that defense, relied on that defense in his closing argument, but completely failed to support that defense with readily available forensic evidence now undisputed by the state. The actual facts of this case bear no resemblance at all to either the case or issue on which the state seeks certiorari.

The state's request for certiorari on the question of whether counsel's investigative responsibilities were lowered because he thought his client was guilty falters for an even more basic reason. Not only has the state never raised this issue before, but when the issue was raised *sua sponte* by the en banc panel at oral argument, the state *explicitly* conceded there was "no evidence" at all that defense counsel "thought his client was guilty." The en banc panel can hardly be faulted for accepting the state's explicit concession.

Finally, the state's concerns about the en banc panel's prejudice analysis – based on the state's view that "the blood evidence was hardly crucial to the defense case" – do not merit certiorari. This is plainly a case-specific application of the inherently fact-bound second prong of the *Strickland* test. As such, it seems uniquely inappropriate for certiorari. Equally important, the factual premise of the state's request – its assertion that the blood pool evidence was not important – is not only incorrect, and not only misses the entire point of the defense which counsel himself selected in this case, but ignores the state's own concession that if the blood pool was from Klein, the state's theory of the case was "palpably incorrect." Once again, the en banc court should not be faulted for taking this same view. Certiorari should be denied.

A. In Finding Counsel Unreasonable For Failing To Investigate The Defense He Himself Selected And Relied On Throughout Trial, The En Banc Panel Followed This Court's Precedents And The Case Law From Every Circuit That Has Ever Addressed This Issue.

The state argues certiorari is appropriate because the en banc decision "in effect laid down a per se rule requiring counsel to investigate and to produce expert-opinion testimony" and "improperly enlarged counsel's duty to investigate to include consultation with and presentation of an expert in virtually every case in which the prosecution could conceivably offer expert relevant forensic testimony." Petition for Writ of Certiorari at 15-16. As an initial matter, it is difficult to square the state's request for certiorari with the actual findings of the district court.

Although the state now ignores it almost entirely, the district court reached two conclusions which are undisputed and which control this case: (1) defense counsel selected a theory of defense, presented it to the jury in opening statement, called his client to support it and relied on it in closing argument and (2) defense counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." These two findings assume importance in light of consistent case law from this Court and around the country.

Both this Court, and every circuit court to address the issue, have held that where a criminal defense lawyer affirmatively selects a defense theory of the case, stands by that theory throughout the presentation of evidence, and relies on that theory in closing argument, the lawyer's failure to investigate readily available evidence supporting that theory is unreasonable. *See, e.g., Wiggins*, 539 U.S. at 526 (in penalty phase, defense counsel promised jury evidence regarding defendant's difficult life but failed to follow through on this promise; held, *Strickland* violated); *Dugas v. Coplan*, 428 F.3d 317, 328-29 (1st Cir. 2005); *Clinkscale v. Carter*, 375 F.3d 430, 435 (6th Cir. 2004); *Soffar v. Dretke*, 368 F.3d 441, 473 (5th Cir. 2004); *Eve v. Senkowski*, 321 F.3d 110, 126-30 (2d Cir. 2003); *Pavel v. Hollins*, 261 F.3d 210, 219 (2d Cir. 2001); *Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir. 1999); *Chambers v. Armontrout*, 907 F.2d 825, 828-30 (8th Cir. 1990); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990). Indeed, only days ago this Court itself found counsel's penalty phase representation deficient where counsel "told the jury that [defendant] . . . was not mentally healthy" but failed to investigate or present readily available evidence which would have proven this very fact. *Porter v. McCollum*, 130 S.Ct. 447, 449 (2009). Given the facts here – where defense counsel's theory in both opening and closing was that the physical evidence (including the blood pool) showed Klein was not killed on the couch – requiring counsel to investigate the theory he was relying on is hardly "eccentric" as the state suggests, but simple common sense consistent with authority from this Court and the rest of the country.

But this is not the only authority which the en banc opinion here faithfully followed. The district court found that defense counsel believed "the trial would be primarily a credibility case." Pet. App. at 39a. Every circuit to address this issue has held that when trial counsel in a criminal case recognizes the case will come down to a credibility contest between the defendant and a state witness, counsel's failure to investigate readily available testimony directly supporting the defense is unreasonable. *Ramonez v. Berghius*, 490 F.3d 482, 488-90 (6th Cir. 2007) (failure to present evidence supporting defendant's testimony violated *Strickland* where the trial "boil[ed] down to a credibility contest"); *Clinkscale*, 375 F.3d at 445 (failure to present evidence supporting defendant's testimony violated *Strickland* where the "evidence boiled down to a credibility contest" between defendant and the state's only eyewitness); *Pavel*, 261 F.3d at 223-24; *Lindstadt v. Keane*, 239 F.3d 191, 203 (2d Cir. 2001) ("[i]n a credibility contest, the testimony of neutral disinterested witness is exceedingly important."); *Holsomback v. White*, 133 F.3d 1382, 1385-87 (11th Cir. 1998); *Williams v. Washington*, 59 F.3d 673, 681-82 (7th Cir. 1995); *Griffin v. Warden*, 970 F.3d 1355, 1359-60 (4th Cir. 1992); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985). *See also Bigelow v. Haviland*, 576 F.3d 284, 291 (6th Cir. 2009). As these cases all recognize, it is neither unreasonable nor eccentric to require defense counsel in a serious criminal case to at least investigate the physical evidence when he knows the case will be a credibility contest which could be determined by the physical evidence.

The state ignores all this authority, as well as the district court's findings. Instead, the state expresses concern with the integrity of the decision-making process of criminal defense lawyers. The state notes that "[d]efense lawyers are not deficient when they carefully exercise their judgment 'about how best to marshal their time and serve their client'" and that counsel need not "scour the globe" or search for a "needle in a haystack." Petition for Writ of Certiorari at 13-14. The state argues counsel must be free to "use professional judgment in deciding which lead to pursue and which lines of attack will be a waste of investigation time" and counsel need not prepare for "evidence the prosecution *might* present *if* it happens to develop at some point in time." Petition for Writ of Certiorari at 14, 16, emphasis in original. The state adds repeatedly that counsel was entitled to challenge the state's case by cross-examination rather than calling his own expert. *Id*. at 11, 15, 21.

Respondent fully agrees with these general propositions. Once again, however, petitioner's argument cannot be squared with the actual facts of this case.

Defense counsel here did not offer any of these reasons for failing to consult a blood spatter expert, instead forthrightly conceding that he simply did not consider the issue and was unaware such testimony could be obtained. ER 289-92. It is, therefore, hard to imagine how the en banc opinion somehow interfered with a "careful[ ] exercise [of counsel's] judgment" in deciding "which leads to pursue and which lines of attack will be a waste of time." Moreover, defense counsel agreed that "even before" the state decided to call Bell as a witness, it was "always [his] intention" to argue that the blood pool proved "Mr. Klein had been shot [in the bedroom] . . . as opposed to being shot on the couch." ER 374. Thus, the en banc court's opinion has nothing at all to do with any "decision" by counsel to rely on cross-examination. No such decision was made; the state is seeking to protect tactical judgments defense counsel here admitted he did not make. *See Wiggins*, 539 U.S. at 526-27 (in the absence of a strategic reason offered by counsel for a particular choice, both courts and the state must avoid substituting a "*post hoc* rationalization of counsel's conduct."). *Accord Richards v. Quarterman*, 566 F.3d 533, 564 (5th Cir. 2009); *Keith v. Mitchell*, 466 F.3d 540, 543-44 (6th Cir. 2006); *Dugas*, 428 F.3d at 333-34; *Smith v. Mullin*, 379 F.3d 919, 929 (10th Cir. 2004); *Brown v. Sternes*, 304 F.3d 677, 691 (7th Cir. 2002); *Griffin*, 970 F.2d at 1358.[3]

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[3] Defense counsel's refusal to rationalize his complete failure to investigate makes sense. After all, "strategic choices

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Similarly, the state's concern that defense counsel here was required to "scour the globe," look for a "needle in a haystack" or prepare for "evidence the prosecution *might* present" is also wholly unwarranted. Indeed, it is hard to imagine a less apt description of the facts of this case, which involve counsel's failure to investigate and present evidence which he recognized as crucial, told the jury in opening statement was crucial, called his own client to testify about at trial and relied on in closing argument. To use the state's own hyperbole, the en banc opinion did not require defense counsel to search for a needle in the haystack; it required him to simply look at the haystack itself. Certiorari should be denied.

B. The State May Not Seek Certiorari On A Point It Explicitly Conceded Below And Which – As The State's Concession Establishes – Is Entirely Unsupported By The Record.

Petitioner posits a second reason this Court should grant certiorari, also related to the performance prong of the *Strickland* test. Petitioner correctly notes that "when a defendant has given

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made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 691. But where counsel utterly ignores "pertinent avenues of investigation," the decision not to investigate is not a reasonable professional judgment. *Porter*, 130 S.Ct. at 453.

counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Petition for Writ of Certiorari at 17. In a detailed argument, petitioner assails the en banc decision – and urges the Court to grant certiorari – alleging that counsel here did not investigate because "counsel had good reason to believe respondent was a murderer and a liar" and "[b]ased on the information available to him, defense counsel reasonably could conclude that forensic investigation into the blood evidence . . . would be fruitless." Petition for Writ of Certiorari at 17-18.

This suggestion for certiorari need not long detain the Court. Notwithstanding the vigor of petitioner's attack, it is hard to fault the en banc court for its decision. Not only did petitioner never raise this argument below, but when the en banc court raised it *sua sponte*, petitioner explicitly conceded there was "no evidence" at all to support the argument:

> The Court: Well, the defense didn't bother to investigate at all, because one theory, they thought that their client was guilty.
>
> Attorney General: Uh, I – I have no way of, uh, knowing what, uh, [defense counsel] Mr. Axup –

> The Court: Well, the fact that the defense didn't investigate doesn't seem to prove very much in this case.
>
> Attorney General: I think that, uh, uh. Your honor, I – *I don't think that there's anything to support the assertion that Mr. Axup thought his client was guilty*, and therefore softballed the case, or didn't investigate for that reason or whatever.
>
> The Court: I thought that was one theory I heard, that, um, defense counsel was questioned about, that you don't look because you don't believe your client.
>
> Attorney General: Right. But there's *no evidence that that's what happened* in this case.

Richter v. Hickman, 06-15614, Oral Argument at 43:05-43:43, http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002585, emphasis added.

The state's request for certiorari to review an issue it never presented below, and then explicitly conceded when it was raised, is without merit. *See F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 628 (1992) (certiorari inappropriate as to an issue which was conceded in lower court); *Steagald v. United States,* 451 U.S. 204, 208-11 (1981) ("the Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below. . . .").

There was good reason for the state to concede "there's [nothing] to support the assertion that [defense counsel] thought his client was guilty." During his deposition, defense counsel made clear that defendant "maintained [his] innocence" throughout the process. ER 386. And not only had Johnson given starkly varying versions of the incident to police, but police found two different caliber shell casings in the corner of the living room, both fired from guns which – according to state witnesses – ejected to the right. Thus, to accept the state's theory, the jury would have to believe (1) two people shot at Klein from virtually the same location, (2) despite being shot from the same location, these two bullets entered opposite sides of Klein's body as he slept and (3) one shot was an "intermediate range wound" while the second was a "distant range wound." RT 272, 276, 282-83, 1576.

Despite its own concession below, petitioner now argues defense counsel believed his client guilty because (1) after he "successfully prevented the admission" of a conversation between respondent and Branscombe, respondent "of course" lied when "he denied making the statements" during cross-examination, (2) respondent's girlfriend Lauren Sullivan refused to tell police what respondent told her about the crime (suggesting the statements were inculpatory) and (3) respondent "tried to destroy the firearms evidence." Petition for Writ of Certiorari 5, 17, 18. The record tells quite a different story.

In fact, the trial court ruled the conversation between Richter and Branscombe admissible, when no such conversation was introduced at trial the state appellate court found "there was no evidence of any such statement," and respondent never denied the conversation at all, but simply said he "[did not] remember" what he said during the conversation nearly one year earlier. CT 184-86; RT 5-6; Pet. App. 13a; RT 1136. Equally important, though it takes a different tack now, on appeal in state court the state "vehemently disagree[d]" that any adverse implication about respondent's guilt could even be drawn from this conversation. *People v. Richter*, C023375, Respondent's Brief at 36.

In fact, Ms. Sullivan (Richter's girlfriend) did not refuse to talk to police. Detective Bell himself admitted that Sullivan told police she spoke with Richter on the night of the shooting. RT 1335. Sullivan, who was studying to become a police officer herself, told the jury that Richter said Johnson "went crazy" and "[t]here was a shooting." RT 977, 979, 1005-06. She agreed she told police "I don't think I should talk about it," because "it was more important" for police to get the details directly from respondent. RT 985, 1005, 1006. She repeatedly maintained that Richter had done nothing wrong. RT 979, 985, 995-96, 1009.

In fact, respondent never "tried to destroy the firearms evidence." To the contrary, co-defendant Branscombe threw the guns away and respondent actually helped police find them. After the shooting, respondent drove Branscombe from the shooting scene. RT 1109. Branscombe threw the guns out of the truck. RT 1119. Immediately upon arrest, respondent cooperated with police and led detectives directly to the area where Branscombe threw the guns; one of the guns was located in this area. RT 454, 457.[4]

The state then shifts gears, noting that the en banc court observed in a footnote there was "no negative consequence" for counsel to investigate the blood spatter evidence. Petition for Writ of Certiorari at 19. Seizing on this footnoted phrase, the state argues certiorari is appropriate because it violated *Knowles v. Mirzayance*, 556 U.S. ___, 129 S.Ct. 1411 (2009). Petition for Writ of Certiorari at 17, 19. The argument misreads both the en banc opinion and, more importantly, *Knowles* itself.

In assessing whether a particular decision by counsel is reasonable, reviewing courts routinely consider whether there were adverse consequences to defendant which may have factored into counsel's decision-making process. Where a potential adverse consequence exists, that is indisputably relevant to assessing the reasonableness of counsel's conduct *See, e.g.*, *Bell v. Cone*, 535 U.S. 685, 701-02 (2002); *Emmet v. Kelly*, 474 F.3d 154, 165-66 (4th Cir. 2007); *Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005); *Cofske v. United States*, 290 F.3d 437, 444-45 (1st Cir. 2002); *Sacco v. Cooksey*, 214 F.3d 270, 275 (2d Cir. 2000). Similarly, where there is no potential adverse consequence, that too is relevant. *See, e.g.*, *Bell v. Miller*, 500 F.3d 149, 157 (2d Cir. 2007); *Stevens v. McBride*, 489 F.3d 883, 896 (7th Cir. 2007); *Clinkscale*, 375 F.3d at 443; *Conklin v. Schofield*, 366 F.3d 1191, 1213 n.5 (11th Cir. 2004); *Frazier v. Huffman*, 343 F.3d 780, 796 (6th Cir. 2003); *Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999); *Holsomback*, 133 F.3d at 1387-88. Consistent with this authority, the en banc court here properly considered both the potential gains from investigating the blood evidence and the potential risks.

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[4] Even putting these inaccuracies aside, and as noted above, the fact remains that counsel here admitted he failed to consult a blood spatter expert not because he thought his client was guilty but because he simply did not consider it and did not know such evidence existed. ER 289-92. Given the state's affirmative concession below that there was no evidence at all to support the newly minted explanation it now gives this Court, it is hard to fault the en banc court for refusing to adopt that explanation *sua sponte*.

The state's suggestion that *Knowles* precludes reviewing courts from such an analysis fundamentally misreads *Knowles*. In *Knowles* defense counsel fully investigated a potential defense of insanity but elected not to present it because he concluded it had no chance of success. 129 S.Ct. at 1420-23. This Court held that the mere fact counsel had "nothing to lose" from presenting the defense did not mean his informed decision not to present that defense was somehow unreasonable. 129 S.Ct. at 1419 and n.3.

In contrast to *Knowles*, defense counsel here did not investigate the blood spatter evidence at all. And the en banc court here did *not* find counsel's conduct unreasonable because he had nothing to lose from investigating. To the contrary, it found counsel's conduct unreasonable because he had a great deal to gain from investigating the theory he himself had decided to present to the jury, and he later conceded he had no tactical reason for failing to investigate. Counsel could have consulted an expert in blood spatter pretrial without the prosecution being aware of the consultation, and doing so entailed no risk to respondent. As the case law discussed above shows, in deciding whether counsel's conduct fell below the standard of care, it was entirely proper for the court to consider not just the potential gain to the defendant, but the potential risk. Indeed, precluding consideration of the potential risks to a defendant from counsel's inaction would not only constitute a sharp break from the case law discussed above, it would make nearly impossible this Court's sound admonition that reviewing courts "evaluate [counsel's] conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689. Certiorari should be denied.[5]

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[5] The irony of petitioner's current position should not escape the Court. Only weeks ago the state sought certiorari in *Wong v. Belmontes*, ___ S.Ct. ___, 2009 WL 3805746 (2009). *Wong* was a capital case where defense counsel elected not to introduce certain mitigating evidence because it risked allowing the state to introduce rebuttal evidence showing defendant committed another murder. After a panel found ineffective assistance of counsel for failing to present this evidence, the

(Continued on following page)

C. The En Banc Court's Case-Specific Prejudice Analysis, Based On A Proper Understanding Of The Importance Of The Blood Pool Evidence To The Case, Does Not Merit A Grant Of Certiorari.

Finally, petitioner urges certiorari to review the en banc court's case-specific prejudice analysis. The state's thesis is that there was nothing "objectively unreasonable" about the state court's one-sentence denial of respondent's claim within the meaning of 28 U.S.C. § 2254(d) because, as a purely factual matter, (1) "the blood [pool] evidence was hardly crucial to the defense case" and (2) even if it was, respondent's habeas experts "could offer [no] more than speculation that Klein's blood might have been in the pool." Petition for Writ of Certiorari at 22.

Certiorari is inappropriate on this point because, although the facts of this case are complex, petitioner is seeking certiorari based on two fundamentally mistaken factual premises. The first is the suggestion that the blood pool evidence "was hardly crucial to the defense case." The suggestion is remarkable.

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state alleged certiorari was proper because the panel "failed to recognize [defense counsel's] grave concerns over doing anything to jeopardize the court's ruling to exclude evidence of the [other] murder." *Wong v. Belmontes*, 08-1263, Petition for Writ of Certiorari, 2009 WL 1009831 at * 15. In other words, under the state's view certiorari is appropriate where a panel (1) *fails* to consider the risk to a defendant from a particular action by trial counsel and (2) actually *does* consider the risk to a defendant. Nice work if you can get it.

The district court correctly concluded that two starkly different theories were presented to the jury: (1) the state's theory that "Klein was shot in cold-blood on the couch" and (2) the defense theory "Klein was shot not on the couch while asleep but during a struggle in the bedroom." Pet. App. 27a. Thus, the entire defense theory that Klein was shot during a struggle, rather than in cold-blood on the couch, depended on establishing where Klein was shot. In short, the entire case rested upon the source of the blood pool.

For his part, respondent concedes – as he has throughout this litigation – that if the blood pool is from Johnson, respondent's testimony that Klein was shot in the bedroom is false and the defense theory cannot be true. But what is sauce for the goose is sauce for the gander; the state must similarly concede that if the blood pool is from Klein, Johnson's testimony that Klein was shot on the couch is false and the state's theory cannot be true.

Indeed, given the state's own position in this case, the en banc panel's conclusion that the blood evidence was critical is hardly surprising. During discovery in district court, the state advised the district court it had to decide whether defense counsel was aware "Dr. Hermann and Mr. Moses . . . would have testified that the prosecution's theory, i.e., that the pool of blood deposited in the doorway between the bedroom and living room came from Mr. Johnson's wounds, was 'scientifically unreliable.'" *Richter v. Hickman*, CV-0643, People's Statement of

Preliminary Issues at 2. And at oral argument the state conceded the same point again:

> The Court: What I wanted to understand from you is at least to that one point, the State alleged that Mr. Klein was killed on the couch. He never – he was asleep. They shot him when he was asleep. He never could have been there. So if there was blood on the floor by the door in the blood pool from Mr. Klein, the state's theory, at least, would have been palpably incorrect. Isn't that right?
>
> Attorney General: Um, it – it may have been incorrect as to that particular point.

Richter v. Hickman, 06-15614, Oral Argument at 31:42-32:26, http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002585. The state later agreed that evidence proving Klein's blood was in the pool "tended to substantiate the self-defense [claim] – at least raises the issue for the jury." *Id.* at 48:00-48:30. Petitioner is once again assailing the en banc court for recognizing the consequences of petitioner's own concessions.

Petitioner's alternate suggestion that respondent's habeas experts "could offer [no] more than speculation that Klein's blood might have been in the pool" is puzzling at best. Moses specifically concluded that the state's theory Johnson was the source of the blood pool as he stood dripping into it could be "eliminated." As noted above, his conclusion was hardly "speculation":

> The lack of a large number of satellite dropletts (sic) surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing in[ ] the doorway dripping into the pool below.

During the discovery process in district court, the state conceded that in connection with the blood pool "[t]he evidence of record discloses that no 'satellite drops' were observed by the crime scene investigators." *Richter v. Hickman*, CV-01-0643, Respondent's Answer to Interrogatory 9. Equally important, the state's own forensic expert agreed that "[w]hen you have blood dripping into blood, you have small satellite spatter that occurs." RT 139.

In short, the state conceded (1) the factual basis for Moses's conclusion and (2) the forensic basis for that conclusion. And when given a chance in district court to cross-examine Moses or offer evidence of its own, the state did nothing, instead stipulating to Moses's expert testimony without cross-examination and without presenting any contrary testimony at all. Under these circumstances, the state's request for certiorari by alleging that Moses's opinion is "speculative" is made not by relying on the record, but by ignoring it almost completely. Certiorari should be denied.

◆

CONCLUSION

In accord with every case to face this issue, the en banc court found defense counsel unreasonable for failing to even investigate the defense theory he selected and relied on throughout his case. In accord with every case to face this issue, the en banc court refused to invent tactical reasons which counsel did not offer, and instead relied on explicit concessions by the state. And when the state neither cross-examined nor rebutted defendant's expert testimony, but instead agreed that it rendered the state's central theory of the case "palpably incorrect," the court granted relief. Under these circumstances, the en banc court's finding of ineffective assistance follows existing law to the letter and is neither remarkable nor worthy of certiorari.

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REPLY BRIEF

No. 09-587

Supreme Court, U.S.
FILED
DEC 28 2009
OFFICE OF THE CLERK

COPY

In the Supreme Court of the United States

KELLY HARRINGTON, WARDEN, *Petitioner*,

v.

JOSHUA RICHTER, *Respondent*.

ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION

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QUESTIONS PRESENTED

In granting *habeas corpus* relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. section 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

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ARGUMENT

THE NINTH CIRCUIT VIOLATED 28 U.S.C. § 2254(D) IN REJECTING THE CALIFORNIA SUPREME COURT'S DECISION

A. Introduction

Respondent Richter's trial counsel had to steer between daunting evidence of his client's guilt—incontrovertible physical evidence that Patrick Klein was shot at close range by two different-caliber semi-automatic firearms and the eyewitness testimony of another gunshot victim who identified respondent as one of two burglars responsible for the murder of Klein—and respondent's insistence that he was not involved in committing the crime. So counsel crafted the best defense available at the time: an attack on the credibility of the survivor and exploitation of deficiencies in the police investigation of the crimes. Counsel's strategy also took into account that the prosecution, as of the start of trial, had neither performed any scientific testing of various samples of blood collected by the police investigator at the crime scene nor expressed any intention to introduce expert testimony in regard to that evidence.

After the presentation of evidence had begun, however, the prosecution had the blood stains collected at the crime scene analyzed by a serologist. Over defense counsel's objection and pleas for a continuance, the prosecutor then presented the testimony of the serologist, plus the testimony of a police detective as a blood-spatter expert. Respondent's counsel met this evidence by cross-examining the serology expert who admitted that she had not tested the stains for cross-contamination and that she had only been able to run one test. He also cross-examined the detective to good effect.

The Ninth Circuit granted respondent habeas corpus relief, holding that the California Supreme Court "unreasonably applied" this Court's "clearly established" *Strickland v. Washington* ineffective-counsel standard in denying respondent's claim. But the Ninth Circuit erred in two fundamental ways. Rather than apply *Strickland's* clearly-established general and deferential rule, the court of appeals instead invoked its own novel and idiosyncratic rule requiring counsel to meet expert-opinion evidence offered by the State with expert-opinion evidence from the defense. And it purported to find that the state court unreasonably had failed to detect the requisite "probable prejudice" of a *Strickland* claim, even though respondent never produced, in either the state or federal court, any expert who had re-examined the allegedly crucial blood pool or proved able to refute the State's serologist's findings.

B. The Ninth Circuit Improperly Imposed, in the Guise of "Clearly Established Law," a Novel Expert-Testimony Requirement on Defense Counsel

In *Knowles v. Mirzayance*, 556 U.S. ___, 173 L.Ed.2d 251 (2009), this Court confirmed that, under 28 U.S.C. § 2254(d)(1), federal habeas relief may be granted on an ineffective-counsel claim only if the state-court decision unreasonably applied the general and deferential standard established by *Strickland v. Washington*, 466 U.S. 468 (1984). As this Court explained in Knowles, a "doubly deferential judicial review" standard applies to a *Strickland* claim evaluated under § 2254(d). *Mirzayance*, 129 S.Ct. at 1410; see *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam). It cannot be "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific ineffective-counsel rule that has not been squarely established by this Court. *Mirzayance*, 129 S.Ct. at 1419; *Wright v. Van Patten*, 552 U.S. 120, ___, 128 S.Ct. 743, 169 L.Ed.2d 583, 586-587 (2008) (*per curiam*); *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007); *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).

Yet the Ninth Circuit in this case granted habeas corpus relief to respondent on the basis of such a novel rule. Richter, of course, can cite no case in which this Court has ever held that defense counsel must consult with and/or present experts in every case in which expert opinion testimony might prove useful. Moreover, Richter, like the en banc court, can cite no case that stands for the proposition that defense counsel must invariably respond in kind to expert evidence presented by the prosecution rather than rely on other, equally effective methods such as cross-examination.

Richter instead asserts that "this Court, and every circuit court to address the issue, have held that where a criminal defense lawyer affirmatively selects a defense theory of the case, stands by that theory throughout the presentation of evidence, and relies on that theory in closing argument, the lawyer's failure to investigate readily available evidence supporting that theory is unreasonable." (Opp. at 21.) But, while this Court has found counsel ineffective for failing to follow up on investigative leads evident from information counsel had already obtained (see *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); Opp. at 21-22), it cannot reasonably be said in this case that Richter's counsel unreasonably failed to investigate any information he had obtained prior to trial about the blood spatter evidence. Instead, Richter's counsel reasonably based his defense strategy on the prosecution's failure to examine the available blood evidence and to express any intention of presenting forensic evidence in support of its theory of the case.

Richter similarly argues that the en banc court's decision is consistent with decisions of this and other federal courts that have addressed the failure of defense counsel to investigate and present impartial evidence that could corroborate the defendant's testimony in a "credibility contest." (Opp. at 22-23.) Richter asserts (see Opp. at 25) that "the en banc opinion did not require defense counsel to search for a needle in a haystack; it required him to simply look at the haystack itself." Richter's assertion reveals the same flawed reasoning that permeates the en banc court's decision. Here, trial counsel had no reason to suspect that there was a "haystack" he should look into, because the prosecution had given no notice of its intention to present evidence that it derived from a previously ignored source.

C. The State Court's Decision Was Not an Unreasonable Application of this Court's General and Deferential *Strickland* Rule.

In the instant case, Richter's counsel prepared the defense with the reasonable understanding that the prosecution (1) intended to rely heavily on the testimony of the surviving victim, Joshua Johnson, a marijuana dealer, and (2) had not expressed any intention of presenting expert testimony in regard to blood spatter at the crime scene. The anticipated lack of forensic proof regarding the blood spatter was important to defense counsel because it meant the trial was destined to turn into a "credibility contest."

As this Court has held, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689 (emphasis added). Inasmuch as Richter's counsel had no reason to expect the prosecution would present expert testimony in regard to blood spatter, he had no reason to conduct a thorough investigation of the blood evidence at the crime scene.

In finding that Richter's counsel rendered ineffective assistance because he did not investigate and present expert opinion evidence in regard to blood spatter, the en banc court not only erected a novel standard for attorney competence that in essence requires the presentation of expert testimony in every case in which it might prove beneficial, it ignored the "circumstances of counsel's challenged conduct." Further, the en banc court found counsel's failure to present the supposedly vital expert opinion evidence prejudicial.

The Ninth Circuit's decision in this case suffers from the same kind of error that this Court was constrained to correct in *Wong v. Belmontes*, 130 S.Ct. 383 (2009) (*per curiam*). There, the Ninth Circuit determined that a reasonably competent defense lawyer would have introduced more mitigation evidence on top of what counsel had already presented, and that the evidence defense counsel presented and the additional evidence it proposed would have carried greater weight if counsel had submitted expert testimony. In reversing the Ninth Circuit, this Court explained that "the notion that the result could have been different if only [defense counsel] had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful." 130 S.Ct. at 391. As it was in *Belmontes*, the Ninth Circuit's infatuation with expert testimony is manifest in its opinion in this case. And, as in *Belmontes*, the proffered expert evidence here would not have made a difference in the outcome. As Judge Bybee aptly observed, it would only have contradicted Johnson's recollection of the events whereas "the State's blood spatter testimony contradicts the defense's entire case because it establishes that Johnson could not have physically shot Klein." (App. at 189a.)

Richter's opposition brief argues that the Ninth Circuit's decision was "unremarkable" in light of trial counsel's "unreasonable" failure to investigate the theory of defense counsel had chosen to rely on. Like the en banc court, Richter contends that proof regarding the source of the so-called "blood pool" was vital to his defense and that counsel inexplicably failed to seek relevant expert assistance and present evidence that would have corroborated his testimony. Not so. Even if expert testimony could have established the source of the blood pool—and no expert has ever examined it in this case—it would not have undermined the prosecution's case against Richter.

Richter's claim of constitutionally-deficient representation is a chimera. The source of the blood pool can never be known as it was never collected by the police at the crime scene and has never been analyzed by any forensic scientist. The "evidence" that Richter and the Ninth Circuit say would have been uncovered by competent counsel consists of nothing more than untested opinions rendered by Richter's habeas corpus experts to the effect that victim Johnson could not have caused the blood pool if he was standing in the doorway waiting for the police to arrive.[1] With such expert testimony, so Richter's argument goes, the jury then would have believed Richter's testimony that he had seen Klein lying on the floor rather than on the couch where he lay when the police later arrived. This, the argument continues, somehow would have proved that Klein was killed in a crossfire between Johnson and Christian Branscombe—and not, as the prosecutor asserted, while he lay sleeping on the couch.

But, even if such opinion evidence had been presented at trial, it would not have addressed the compelling physical evidence that tied Richter directly to the crimes: the expended .22-caliber CCI Stinger shell casing, found near the couch where Klein lay mortally wounded, that matched live bullets found in Richter's garage by police investigators; and the discovery of Johnson's stolen gun safe and backpack in the same location. Further, neither Richter nor the Ninth Circuit can offer any credible explanation for how or why the gravely injured Klein could have been moved from the floor onto the couch with nary a drop of blood being spilled. Nor can Richter explain why, if Klein had actually deposited the pool of blood while laying face down in the doorway, there was no evidence that blood had drained and accumulated around his face. Instead, the relevant blood spatter evidence that commanded Richter's trial counsel's attention—and that Richter's experts have never even addressed, much less refuted, in the federal habeas proceedings—was the testimony of Detective Bell whose opinions were directed to the blood patterns and spatter on Klein's body and in other areas of the crime scene.

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[1] Richter's repeated descriptions of his habeas experts' opinions as "undisputed" or "unrebutted" apparently derives from nothing more than the State's unexceptional stipulation that, if Richter's federal habeas experts were called to testify in the district court *at an evidentiary hearing*, their testimony would be consistent with the content of their declarations—nothing more. The State has *never conceded* that such testimony, if presented *at trial*, would have conclusively disproved the People's case regarding the circumstances surrounding the murder of Patrick Klein.

Thus, despite the Ninth Circuit's portrayal of it, the proffered expert evidence about the source of the blood pool could hardly have undermined the prosecution's case let alone establish Richter's innocence. For the reasons discussed herein and in the petition for writ of certiorari, petitioner submits that the en banc court's decision should be reviewed.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: December 21, 2009

Respectfully submitted

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JOINT
APPENDIX

Supreme Court, U.S
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In the Supreme Court of the United States

KELLY HARRINGTON, WARDEN, *Petitioner*,

v.

JOSHUA RICHTER, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR CERTIORARI FILED NOVEMBER 9, 2009
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United States District Court for the Eastern District of California

Case No. CIV.S-01-963 JKS P

April 2, 2001 – Joshua Richter files a PETITION FOR WRIT OF HABEAS CORPUS and pays the filing fee.

July 20, 2001 – The Warden files his ANSWER to the Petition for Writ of Habeas Corpus.

July 20, 2001 – The Warden files a NOTICE OF LODGING re the state court record: Appellant's Opening Brief (court of appeal); Respondent's Brief (court of appeal); Appellant's Reply Brief (court of appeal); Reporter's Transcript on appeal, court of appeal Vols. I-VI; Reporter's Transcript on Augment, court of appeal; Clerk's Transcript on appeal, court of appeal Vols. I-II, Clerk's Augmented Transcript on Appeal, court of appeal.

August 20, 2001 – Richter files his TRAVERSE to the Answer to the Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities in Support Thereof.

April 5, 2003 – ORDER by Chief Judge William B. Shubb ordering case reassigned to Judge James K. Singleton Jr.

November 17, 2003 – Judge Singleton issues a Scheduling and Planning Order; among other things, the Order directs the parties to designate expert witnesses, to depose Richter's and Christian

Branscombe's trial counsel, and to separately file a preliminary statement of issues.

January 14, 2005 – Richter files his Opening Supplemental Brief. (Attachments: # 1 Exhibits A through D, # 2 Exhibits E through L, # 3 Exhibit M Part I, # 4 Exhibit M Part II, # 5 Exhibit M Part III, # 6 Exhibit M Part IV.)

February 10, 2005 – The Warden files his Supplemental Brief in Opposition to the Petition for Writ of Habeas Corpus.

March 29, 2005 – Richter files his Reply to the Warden's Supplemental Brief.

March 24, 2006 – Judge Singleton issues a written decision and ORDER denying Richter's Petition for a Writ of Habeas Corpus. In addition, Judge Singleton declines to issue a certificate of appealability.

March 24, 2006 – JUDGMENT is entered in accordance with Judge Singleton's Order denying the Petition for Writ of Habeas Corpus.

April 4, 2006 – Richter files a NOTICE of APPEAL.

* * *

Ninth U.S. Circuit Court of Appeals

Case No. 06-15614

April 6, 2006 – Richter's request for a certificate of appealability is filed.

April 27, 2006 -- Richter files a motion for a certificate of appealability

January 25, 2007 -- Filed order (Ronald M. GOULD, Richard A. PAEZ):With respect to appellant Joshua Richter's appeal (No. 06-15614), the request for a certificate of appealability is GRANTED with respect to the following issues: (1) Whether trial counsel rendered ineffective assistance in violation of the Sixth Amendment by failing to investigate, develop, and present (a) forensic evidence regarding ballistics, blood spatter, serology, and/or pathology; and (b) additional testimony regarding the location of Johnson's safe at the time of the crime; (2) whether appellant's due process rights were violated by the trial court's response to the jury's questions regarding aider and abettor and felony murder liability; and (3) whether the prosecution knowingly suppressed potentially exculpatory evidence and/or presented false testimony in violation of appellant's due process rights. See 28 U.S.C. 2253(c)(3). The opening brief is due April 9, 2007; the answering brief is due May 9, 2007; the optional reply brief is due within 14 days after service of the answering brief.

May 8, 2007 – Appellant Joshua Richter files an original and 15 copies of the opening brief (62 pages) and five Excerpts of Record in two volumes.

June 8, 2007 – The Warden files an original and 15 copies of the Appellee's brief (58 pages), and one volume of Supplemental Excerpts of Record.

July 3, 2007 – Joshua Richter files an original and 15 copies of the reply brief.

October 15, 2007 – ARGUED AND SUBMITTED TO Robert R. BEEZER, N. R. SMITH, Stephen S. TROTT.

April 9, 2008 – OPINION FILED (28 pg.) (ROBERT R. BEEZER, STEPHEN S. TROTT and N. RANDY SMITH). AFFIRMED. [Affirmed; on the merits after oral hearing; Written, reasoned, signed, published; Judge: RRB Authoring, Judge: SST On Panel But Did Not Write, Judge: NRS On Panel But Did Not Write.] FILED AND ENTERED JUDGMENT.

April 24, 2008 – Joshua Richter files original and 50 copies of Appellant's petition for panel rehearing and petition for rehearing en banc. Number of Pages 18 or word count 4,199. Served on 04/25/2008. (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES)

May 22, 2008 – Filed order (ROBERT R. BEEZER, STEPHEN S. TROTT and N. RANDY SMITH) Appellees are directed to respond to the petition for rehearing and petition for rehearing en banc, within 21 days of the date of this order.

June 12, 2008 – The Warden files an original and 50 copies of Appellees' response to Petition for en banc rehearing. 6 pages. Served on 06/11/2008. Date circulated to the court: 06/13/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES).

June 20, 2008 – Received Appellant's reply to opposition to Petition For Rehearing And Rehearing En Banc of 5 pages. Served on 06/20/2008. (PANEL)

June 30, 2008 – 1 pg., Filed order (ROBERT R. BEEZER, STEPHEN S. TROTT and N. RANDY SMITH): Petitioner's application for order permitting filing of reply to respondent's opposition to petition for rehearing is DENIED.

August 4, 2008 – 1 pg., Filed order (ROBERT R. BEEZER, STEPHEN S. TROTT and N. RANDY SMITH): The petition for panel rehearing and the petition for rehearing en banc are DENIED.

August 18, 2008 – 1 pg., Filed order (ROBERT R. BEEZER, STEPHEN S. TROTT and N. RANDY SMITH): The order denying petition for rehearing and petition for rehearing en banc, filed August 4, 2008, is hereby WITHDRAWN.

November 10, 2008 – 1 pg., Filed Order for PUBLICATION (ALEX KOZINSKI) Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. Judge Callahan did not participate in the deliberations or vote in this case.

November 10, 2008 – 1 pg., Filed order (ALEX KOZINSKI): En banc oral argument will take place during the week of December 15, 2008, in Pasadena, California. The date and time will be determined by separate order. Within seven days from the date of this order, the parties shall forward to the Clerk of Court thirty additional copies of the original briefs and excerpts of record.

December 17, 2008 – ARGUED AND SUBMITTED TO ALEX KOZINSKI, STEPHEN R. REINHARDT, DIARMUID F. O'SCANNLAIN, ANDREW J. KLEINFELD, BARRY G. SILVERMAN, KIM MCLANE WARDLAW, RAYMOND C. FISHER, RICHARD A. PAEZ, JAY S. BYBEE, MILAN D. SMITH, JR. and SANDRA S. IKUTA.

August 10, 2009 – 95 pg., FILED EN BANC OPINION (ALEX KOZINSKI, STEPHEN R. REINHARDT, DIARMUID F. O'SCANNLAIN, ANDREW J. KLEINFELD, BARRY G. SILVERMAN, KIM MCLANE WARDLAW, RAYMOND C. FISHER, RICHARD A. PAEZ, JAY S. BYBEE, MILAN D. SMITH, JR. and SANDRA S. IKUTA) REVERSED AND REMANDED WITH DIRECTIONS. Judge: SR Authoring, Judge: JSB Dissenting, FILED AND ENTERED JUDGMENT.

November 19, 2009 – 1 pg, Received notice from the Supreme Court: petition for certiorari filed on 11/09/2009 and placed on the docket 11/17/09. Supreme Court Number 09-587.

February 25, 2010 – 1 pg., Received notice from the Supreme Court. Petition for certiorari GRANTED on 02/22/2010. In addition to the question presented, the parties are directed to brief and argue the following questions: Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under Strickland v Washington, 466 U.S. 668 (1984). Supreme Court Number 09-587.

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE JOSHUA RICHTER) No.:
)
) Court of Appeal Case
Petitioner,) No. C023375
)
) Superior Court
) (Sacramento)
) 94F0607
)
On Habeas Corpus.)
)
____________________________)

PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

CLIFF GARDNER
State Bar # 93782
1738 Union Street
San Francisco, CA 94123
(415) 922-9404
Attorney for Petitioner
Joshua Richter

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE JOSHUA RICHTER) No.:
)
) Court of Appeal Case
Petitioner,) No. C023375
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)
On Habeas Corpus.)
) PETITION FOR WRIT
___________________________) OF HABEAS CORPUS

Petitioner Joshua Richter, through his counsel, files this petition for writ of habeas corpus. By this verified petition petitioner alleges as follows:

I.

Petitioner is unlawfully confined by the California Department of Corrections at Mule Creek State Prison pursuant to a judgment of the Superior Court for Sacramento County in People v. Richter, No. 94F0607.

II.

Petitioner was convicted of first degree murder in December of 1995. The trial court sentenced him to a life without possibility of parole term.

III.

Petitioner pled not guilty. He was tried by a jury.

IV.

Petitioner appealed his conviction to the Third Appellate District Court of Appeal. On March 20, 1998, the Court of Appeal affirmed his conviction. (People v. Richter, C023375.) Petitioner timely filed a Petition for Review in the California Supreme Court. On June 24, 1998, the Court denied review. The time period within which to seek certiorari from the United States Supreme Court was September 22, 1998.

V.

As to the matters raised in paragraphs VI-XII of this petition, no other petitions for writ of habeas corpus have been filed. Petitioner has no adequate remedy at law. The claims raised in Paragraph XIII are the same claims raised on petitioner's direct appeal and are repeated here in the context of a cumulative prejudice argument made in connection with the new claims raised in Paragraphs VI-XII.

VI.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 15 of the California Constitution. The state presented false testimony and suppressed potentially exculpatory evidence in violation of petitioner's state and federal Due Process rights. Expert testing and examination of this evidence has revealed new evidence supporting petitioner's defense at trial. If defense counsel was obligated to discover the falsehood and/or new evidence, he was constitutionally ineffective for not doing so. The following facts now known to petitioner support this claim:

a. The state charged petitioner, along with co-defendant Christian Branscombe, with the December 20, 1994, shooting death of Patrick Klein and the attempted murder of Joshua Johnson. At the time of the shooting, all four men knew each other and had socialized on the evening of the shooting. The shooting occurred at Johnson's house at 4620 Fair Oaks Boulevard in Sacramento.

b. The shooting occurred in the early morning hours of December 20, 1994.

c. The deceased victim, Klein, was shot twice. He had a superficial wound to the neck from a .22 caliber gun and a fatal wound to the head from a .32 caliber. (RT 278-279.) When police arrived after the shooting, they found Klein on the living room couch. (RT 32.)

d. Petitioner testified at trial that he and Branscombe drove to the Fair Oaks address in the early morning hours of December 20, 1994. (RT 1086.) Branscombe got out of the car and went into the house to return a gun to Johnson. (RT 1085-1087.) Petitioner remained in the car outside the

house. Moments later, petitioner heard shots. (RT 1087.) He ran into the house; when he arrived, Branscombe was screaming that they tried to kill him. (RT 1088-1090.) Petitioner saw Klein lying in the doorway between the living room and bedroom. (RT 1089.)
e. The state's theory was that Branscombe and Richter both entered the house with the intent to steal a safe which Johnson owned, both were present for and involved in the shootings, and Klein was shot as he lay sleeping on the living room couch, where police found him. Under this theory, Branscombe fired the .32 caliber gun while petitioner fired the .22 caliber. (RT 1429-1431.)

f. The defense theory was that there was a shootout, Branscombe fired in self-defense, and Richter entered the house after the shooting had occurred. The defense theory was that Johnson shot a .380 caliber Mac-12 handgun at Branscombe that evening. (RT 1507.) When the Mac-12 jammed, Johnson dropped it and shot his .22 caliber. (RT 1507-1508, 1515.) Under this theory, Klein was not asleep on the couch, but was shot in the bedroom doorway and carried to the couch by Johnson before police arrived. (RT 1508, 1511-1512.)

g. During trial, the prosecutor apparently learned that there was a bullet hole in the floor of the bedroom of the Fair Oaks house. (RT 848.)

h. On November 21, 1995 -- in the middle of trial -- the prosecutor sent investigator Maloney to "look[] for a hole that was apparently in the victim Gunner's -- victim Johnson's floor." (RT 848.)

i. Maloney found a bullet hole which he described as "consistent" with a .22 caliber gun. (RT 848.)

j. Maloney looked in the bullet hole and "noticed that the hole went all the way through" the floor. (RT 849.)

k. Maloney then took a skill saw, cut out a square piece of the floorboard which included the bullet hole, and watched the square piece of floorboard fall into the crawlspace beneath the house. (RT 849.)

1. Maloney testified under oath that there was no access to the crawl space under the house. (RT 854-855.) Thus, the square piece of floorboard he had cut out was now lost. (RT 854-855.)

m. Six days after Maloney cut out the floorboard and allowed it to fall to the crawlspace, Johnson testified that this bullet hole had nothing to do with the case; it was caused when he accidentally fired his .22 caliber rifle while cleaning it. (RT 554, 658.) During his closing argument, the prosecutor would repeatedly rely on the absence of any .380 caliber bullet holes to ridicule the defense theory that Johnson fired his .380 caliber Mac-12 on the morning of the shooting. (RT 1432, 1627, 1635.)

n. Maloney's testimony was false. The crawlspace beneath the house was not inaccessible. The back of the house had a readily accessible opening to the crawlspace. See Declaration of Dale Richter ("Richter Declaration"), attached as Exhibit A at para. 4 and Attachment 2 to the Richter Declaration.

o. After the verdict, Mr. Richter visited the Fair Oaks house. He found the opening to the crawlspace at the back of the house, near the kitchen door. The crawlspace was approximately 2 to 3 feet high. Richter Declaration at para. 4 and Attachment 2.

p. Mr. Richter crawled under the house and found the square piece of floorboard Maloney had cut out and let fall through the floor. He photographed it exactly where he found it, along with the hole in the floor and the supporting beam to which Maloney referred. Richter Declaration at para. 5 and Attachment 3.

q. Mr. Richter took the piece of floorboard and put it in a baggie. He then went into the house and took additional photographs of the hole, this time from the interior of the room as opposed to the crawl space. He gave the piece of floorboard to Mark Axup. Richter Declaration at para. 6-7 and Attachment 4.

r. Several weeks later, Mr. Richter returned to the house. He cut out several sections of the floorboard next to the hole which Maloney had cut out. One was a longer section several feet long. Another was much shorter. He gave these pieces of wood to Mark Axup as well. Richter Declaration at para. 8.

s. Mr. Axup gave the sections of floorboard to ballistics expert James Aiello. Declaration of Mark Axup, attached as Exhibit B, at para. 10-12.

s. Mr. Aiello measured the bullet hole in the square piece of floorboard. The measurements indicated that it was probably a .380 caliber rather than a .22 caliber. Declaration of James Aiello ("Aiello Declaration") attached as Exhibit C, at para. 3.

t. Mr. Aiello then tested a number of firearms on the longer strip of floorboard. He fired a .22 caliber rifle, using a Peters .22 cartridge. He also test fired a Russian Kalashnikov (AK47), a .45 caliber gun, a .380 caliber gun and a 9 millimeter gun. Aiello Declaration at para. 4.

u. The test results showed that the bullet hole caused by the .380 caliber test firing measured the same as the bullet hole in the square piece of floorboard. Aiello Declaration at para. 5-6.

v. Mr. Aiello's professional opinion is that the gun which fired the bullet into the square piece of floorboard he examined was not a .22

caliber rifle, but a .380 caliber gun. Aiello Declaration at para. 6.

w. The prosecutor never disclosed to the defense the square piece of floorboard which Maloney cut out and allowed to drop to the crawlspace. The prosecutor did not correct Maloney's false testimony that the crawlspace was inaccessible. The jury never knew that expert testimony could have been presented showing that Johnson's explanation for the bullet hole was false. The jury never knew that expert testimony could have been presented to support the defense theory that Johnson's .380 caliber Mac-12 was fired in the early morning hours of December 20, 1994.

VII.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 15 of the California Constitution. Trial counsel rendered ineffective assistance of counsel in failing to present readily available expert testimony which directly supported his theory of the case. The following facts now known to petitioner support this claim:

a. The state charged petitioner, along with co-defendant Chris Branscombe, with the December 20, 1994, shooting death of Patrick Klein and the attempted murder of Joshua

Johnson. At the time of the shooting, all four men knew each other and had socialized on the evening of the shooting. The shooting occurred at Johnson's house at 4620 Fair Oaks Boulevard in Sacramento.

b. The shooting occurred in the early morning hours of December 20, 1994.

c. Johnson testified that he lied in bed until his assailants left, then went to the living room, locked the door and called police. (RT 510-513.) Police arrived six minutes later. (RT 27.) In that six minutes, Johnson telephoned his girlfriend and spoke with her father. (RT 515-516.) After this call, he made two separate trips to hide material he used to grow marijuana. Johnson (1) went out of the living room, (2) through the kitchen, (3) into a side closet where he grabbed his marijuana plants (4) left the house by the back door, (5) ran outside to the south side of the house, and (6) threw the plants over the fence. (RT 515-517,581.) Johnson repeated this route for the second trip. (RT 582.)

d. When police arrived after the shooting, they found Klein lying on the living room couch. (RT 32.) Richter testified that when he entered the house after hearing the shots, he saw Klein lying in the doorway between the bedroom and the living room. (RT 1089.) Police found a large pool of blood in the doorway between the bedroom and the living room. See Photographs of Crime Scene, attached as Exhibit D.

e. During his closing argument, the prosecutor argued that Klein was shot on the couch in cold-blood, and that the pool of blood found in the bedroom was left by Johnson, not Klein. (RT 1637-1638, 1640, 1644-1645.) He argued that it was "reasonable" to believe that the pool of blood came solely from Johnson's wounds as he stood in the doorway bleeding. (RT 1637.) The defense argued that the pool of blood came from Klein, establishing that Johnson was lying and Richter telling the truth.

f. Police never obtained a sample from the pool of blood found in the doorway between the living room and bedroom. (RT 937.) Instead, police took a blood sample from a spattering of blood located on the nearby door molding, four inches off the floor. (RT 937.)

g. At trial, criminalist Jill Spriggs testified that she ran tests on this blood as well as the blood of both Johnson and Klein to determine PGM subtypes. (RT 888.) Klein was PGM subtype 1+. (RT 890.) Johnson was PGM subtype 2+ 1+. (RT 890.) The blood sample taken from the crime scene was PGM subtype 2+ 1+. (RT 890.) Spriggs testified that because the crime scene sample was PGM 2+ 1+, "Patrick Klein could not have deposited that blood because ... he is a 1+." (RT 892.)

h. According to expert testimony which would have been readily available for trial, Ms. Spriggs's conclusion is not scientifically reliable. The 1+ band in a 2+ 1+ sample appears at the same location as the 1+ band in a 1+ sample. Thus, in a sample where a 2+ 1+ blood is mixed with 1+ blood, a finding of PGM subtype 2+ 1+ (as Ms. Spriggs found) could not exclude the possibility that the sample contains a mixture of 2+ 1+ and 1+ blood. Declaration of John Thornton, attached as Exhibit E, at para. 4.

i. According to expert testimony which would have been readily available at trial, the prosecutor's argument that Johnson could have deposited the blood found in the blood pool was also medically untenable. Given the nature of the wounds which Johnson received, and his own descriptions of his activities in and location in the six minutes before police arrived, it is "highly unlikely" that he could have deposited the blood found in the blood pool between the bedroom and living room. Declaration of Dr. Paul Herrmann, attached as Exhibit F, at para. 4-6.

j. According to expert testimony which would have been readily available at trial, the prosecutor's argument that Johnson could have deposited the blood found in the blood pool was also untenable from a forensic perspective. Given the wounds which Johnson received, if the blood pool had been caused by dripping from these wounds, the dripping would have caused a large number of round, splash drops -- known as "satellite drops" -- surrounding the main pool of blood. From a forensic perspective, the complete absence of

> such a distinctive pattern "eliminates" the prosecutor's theory that Johnson could have deposited the blood found in the blood pool. In fact, the blood pattern shown by the blood pool is more consistent with having been deposited by a source close to the ground as the defense theorized at trial. Declaration of Ken Moses, attached as Exhibit G, at para. 6-9.
>
> k. Without tactical reason, trial counsel did not present any of this testimony to the jury.

VIII.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 15 of the California Constitution. Trial counsel rendered ineffective assistance of counsel in failing to present readily available expert testimony which directly supported his theory of the case. The following facts now known to petitioner support this claim:

> a. The state charged petitioner, along with co-defendant Chris Branscombe, with the December 20, 1994, shooting death of Patrick Klein and the attempted murder of Joshua Johnson. At the time of the shooting, all four men knew each other and had socialized on the evening of the shooting. The shooting occurred at Johnson's house at 4620 Fair Oaks Boulevard in Sacramento.

b. The shooting occurred in the early morning hours of December 20, 1994. c. The deceased victim', Klein, was shot twice. He had a superficial wound to the neck from a .22 caliber gun and a fatal wound in the head from a .32 caliber. (RT 278-279.) When police arrived after the shooting, they found Klein on the living room couch. (RT 32.)

d. Petitioner testified at trial that he and Branscombe drove to the Fair Oaks address in the early morning hours of December 20, 1994. (RT 1086.) Branscombe got out of the car and went into the house to return a gun to Johnson. (RT 1085-1087.) Petitioner remained in the car outside the house. Moments later, petitioner heard shots. (RT 1087.) He ran into the house; when he arrived, Branscombe was screaming that they tried to kill him. (RT 1088-1090.) Petitioner saw Klein lying in the doorway between the living room and bedroom. (RT 1089.)

e. The state's theory was that Branscombe and petitioner both entered the house with the intent to steal a safe which Johnson owned, both were present for and involved in the shootings, and Klein was shot as he lay sleeping on the living room couch, where: police found him. Under this theory, Branscombe fired the .32 caliber gun while petitioner fired the .22 caliber. (RT 1429-1431.)

f. The defense theory was that there was a shootout, Branscombe fired in self defense, and petitioner entered the house after the shooting had occurred. The defense theory was that Johnson shot a .380 caliber Mac-12 handgun at Branscombe that evening. (RT 1507.) When the Mac-12 jammed, Gunner dropped it and shot his .22 caliber. (RT 1507-1508, 1515.) Under this theory, Klein was not asleep on the couch, but was shot in the bedroom doorway and carried to the couch by Johnson before police arrived. (RT 1508, 1511-1512.)

g. This theory was supported by petitioner's own testimony that because of alterations Johnson made to the Mac-12, it had a tendency to jam. (RT 1057.) The defense presented no ballistics evidence to support the theory that the Mac-12 was prone to jamming.

h. In closing argument, the prosecutor relied on the fact that there was no evidence to support the defense theory that the Mac-12 jammed. (RT 1627, 1635.)

i. Police found and tested the Mac-12. A copy of that report was disclosed to defense counsel who used it during trial. (RT 784.) Prosecution criminalist Robert Garbutt, who performed the tests, testified about the Mac-12 at trial. (RT 784.)

j. Mr. Garbutt noted that the hammer axle of the Mac-12 was missing a circlip retainer which allowed the pin to move from its normal

position. (RT 784-785.) Mr. Garbutt believed this alteration in the gun may have been done in an attempt to make the gun fully automatic from semi-automatic. (RT 786.) He concluded that the missing circlip retainer could cause the gun to fail to fire properly. (RT 785.) In his testimony, Mr. Garbutt stated that he did not know if this alteration could cause the gun to fail to eject a spent cartridge. (RT 785.)
k. In fact, expert ballistics testimony could have presented that this alteration can cause the Mac-12 to fail to eject a spent cartridge. (Declaration of Daniel Joseph, attached as Exhibit K, at para. 4.)

1. Although defense counsel had promised the jury in opening statement that he would present expert testimony, he did not. (Aug. RT 33.) Defense counsel argued to the jury that the Mac-12 jammed without any expert testimony to support that conclusion.

IX.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 15 of the California Constitution. Trial counsel rendered ineffective assistance of counsel in failing to present readily available lay testimony which directly supported his theory of the case. The following facts now known to petitioner support this claim:

a. The state's theory of the case was that Branscombe and Richter both entered the house with the intent to steal a safe which Joshua Johnson owned and both were involved in the shootings and the subsequent theft of the safe.

b. At trial, Johnson admitted that he kept his safe at Richter's house on Gunn Road prior to the December 20, 1994, shooting. (RT 483-484.)

c. Johnson testified that in the end of November or the beginning of December, he and a friend moved the safe back to Johnson's house where it was on the evening of the shooting. (RT 485.) Scott Brown testified that he was that friend. (RT 1304.)

d. When police searched defendant's house on December 20, 1994, they found Johnson's safe. (RT 424-425.)

e. The state's theory of the case was that after shooting Klein and Johnson, Branscombe and Richter moved the safe to Richter's Gunn Road house. The defense theory of the case was that the safe had been at the Gunn Street house all along.

f. Madalyn Edwards lived at the Gunn Road house. She saw the safe there on December 3 and again during the week of December 5-10. Declaration of Madalyn Edwards, attached as Exhibit H, at para. 3-4.

g. Shane Westburg lived in the Gunn Road house at the time of the shooting along with Linda Stewart. They owned two "very good" watch dogs at the time who were kept in the kitchen. Richter lived in a converted living space in the garage. The entrance to Richter's living space was immediately across from the kitchen where the watchdogs were kept. Both would have testified that if a safe were moved into the garage living space in the early morning hours of December 20th, the dogs would have awakened them. Declaration of Shane Westburg ("Westburg Declaration"), attached as Exhibit I, at para. 2-3; Declaration of Linda Stewart, attached as Exhibit K, at para. 2-3.

h. At the time of the crime, Westburg thought it was odd that the safe could have been moved into the garage without the dogs barking and waking him. Westburg Declaration at para. 4.

i. Without tactical reason, trial counsel did not present this testimony to the jury.

X.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 15 of the California Constitution. The trial court refused to properly answer a critical question from the jury during deliberations. The following facts now known to petitioner support this claim:

a. The state charged petitioner, along with co-defendant Chris Branscombe, with the December 20, 1994, shooting death of Patrick Klein and the attempted murder of Joshua Johnson. At the time of the shooting, all four men knew each other and had socialized on the evening of the shooting. The shooting occurred at Johnson's house at 4620 Fair Oaks Boulevard in Sacramento.

b. The shooting occurred in the early morning hours of December 20, 1994.

c. Defendant testified at trial that he and Branscombe drove to the Fair Oaks address in the early morning hours of December 20, 1994. (RT 1086.) Branscombe got out of the car and went into the house to return a gun to Johnson. (RT 1085-1087.) Petitioner remained in the car outside the house. Moments later, petitioner heard shots. (RT 1087.) He ran into the house; when he arrived, Branscombe was screaming that they tried to kill him. (RT 1088-1090.)

d. The state's theory of the case was that Branscombe and Richter both entered the house with the intent to steal a safe which Joshua Johnson owned and both were involved in the shootings and the subsequent theft of the safe.

e. The defense theory was that petitioner did not enter the house until the shooting had already occurred.

f. The trial court instructed the jury on the felony murder rule, advising the jury that a killing which occurred during the course of a robbery was first degree murder.

g. During deliberations, the jury asked the court for a "clarification" of this exact instruction:

> "Clarification of Instructions:
>
> "If a defendant is found guilty of Robbery & Burglary in the first degree, it is our understanding that this necessarily leads to a guilty verdict of murder in the first degree if a human being is killed during the commission of the above Robbery and Burglary.
>
> Also, if a defendant is found to have aided and abetted in the above Robbery/Burglary, is he guilty of all charges (or can you (sic) find him guilty of lesser charges) as found for the other defendant." (Aug. CT 1.)

h. The trial court consulted with counsel. (CT 316.) This conference was not placed on the record. (RT 1711.)

i. At this conference, the trial court advised counsel it was considering answering the question "yes." Defense counsel objected, arguing that the jury's question went to the timing of petitioner's complicity in the underlying robbery. Counsel argued that if the jury believed petitioner's testimony that he did not enter the house until after the shootings, it could believe he was not involved in the robbery until after the fatal wounds had been inflicted. In this circumstance, the petitioner would not be guilty of first degree murder under the felony murder rule. The court overruled defense counsel's objection and instructed the jury that if it found defendant guilty of robbery, he was necessarily guilty of first degree murder if a human being was killed during the course of the robbery. (Axup Declaration at para. 6; Aug. CT 1.)

j. As a matter of state law, the court's instruction was wrong. (*People v. Pulido* (1997) 15 Cal.4th 713.

k. The jury found petitioner guilty of first degree murder.

XI.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 15 of the California Constitution. Trial counsel rendered ineffective assistance of counsel in making the jury promises in opening statements which he did not fulfill. The following facts now known to petitioner support this claim:

a. Mark Axup, trial counsel for defendant, made an opening statement on November 20, 1995.

b. Mr. Axup said he would call firearms experts to prove that the .380 Mac- 12 jammed. (Aug. RT 33.)
c. Mr. Axup said he would call Linda Stewart to prove that only a few days before the December 20th shooting, Johnson had come by Richter's house and asked if he could come in the house and access his safe. (Aug. RT 32.)

d. Mr. Axup said he would prove that the Johnson house was filled with "methamphetamine or cocaine." (Aug. RT 38.)

e. Mr. Axup said he would prove that Patrick Klein's fingerprints were on the safe. (Aug. RT 31-32.) f. Mr. Axup said he would prove that earlier in the evening, Johnson pointed a loaded gun at both Branscombe and defendant (who were in a car at the time) and ordered them out of the car. (Aug. RT 24.)
g. In his closing argument, the prosecutor told the jury it should "not mistake Mr. Axup's opening statement for evidence." (RT 1357.)
h. In his closing argument, the prosecutor drew the jury's attention to the fact that defense counsel presented no expert evidence that the .380 Mac-12 jammed. (RT 1627, 1635.)

i. In his closing argument, the prosecutor drew the jury's attention to the fact that defense counsel had never called Linda Stewart. (RT 1361.)

j. In his closing argument, the prosecutor drew the jury's attention to the fact that defense counsel never introduced any evidence to show the presence of methamphetamine or cocaine in Johnson's house. (RT 1362.)
k. In his closing argument, the prosecutor drew the jury's attention to the fact that defense counsel presented no evidence showing that Klein's fingerprints were on the safe. (RT 1358.)

1. In his closing argument, the prosecutor drew the jury's attention to the fact defense counsel presented no evidence to show that Johnson ordered Branscombe and defendant out of a car at gunpoint. (RT 1360.)

XII.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 15 of the California Constitution. To the extent it is deemed that any of the issues described in paragraphs VI-X should have been raised in direct appeal, then appellate counsel's failure to raise the issue without tactical reason violated defendant's right to the effective assistance of counsel on appeal.

XIII.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 15 of the California Constitution. Even if none of the errors specified above alone require a new trial, the combination of those errors and/or the combination of those errors with the errors identified by petitioner on his direct appeal, require relief. Petitioner hereby reincorporates the facts and claims set forth in Paragraphs VI through XI above. In addition to those claims, and for purposes of a cumulative error argument, petitioner re-alleges the following claims raised on direct appeal:

a. Trial counsel was ineffective for failing to take a number of steps on petitioner's behalf, including filing a motion to suppress petitioner's statements, objecting to prosecutorial argument, objecting to evidence that petitioner's girlfriend bought a gun, and failing to move to strike Johnson's testimony about threats.

b. The combination of these errors and the errors set forth in Paragraphs VI through XII above, either singly or in combination, present a case of cumulative prejudice, violated petitioner's federal and state constitutional right to Due Process and the effective assistance of counsel, and require that the writ be granted.

WHEREFORE, petitioner prays that this Court:

1. Take judicial notice of the transcripts and court records which accompany this petition;

2. Take judicial notice of the transcripts and court records in *People v. Richter*, C023375;

3. Order respondent to file and serve a certified copy of the record on appeal and show cause why petitioner is not entitled to the relief sought;

4. After full consideration of the issues raised in the petition, vacate the judgment and sentence imposed upon petitioner or, in the alternative,

5. Permit discovery and an evidentiary hearing at which petitioner may offer proof concerning the allegations in this petition; and

6. Grant such other and further relief as may be appropriate.

DATED: 9/13/99 .

Respectfully submitted,

CLIFF GARDNER

By: ____________________

Attorney for Petitioner

VERIFICATION

I, Cliff Gardner, declare that I am an attorney for petitioner Joshua Richter. I make this verification for petitioner because of his absence from the county where I have my office. I have read the attached petition and believe the matters stated therein to be true. On that basis, I allege they are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of September, 1999, at San Francisco, California

Cliff Gardner

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE JOSHUA RICHTER) No.:
)
) Court of Appeal Case
Petitioner,) No. C023375
)
) Superior Court
) (Sacramento)
) 94F0607
)
On Habeas Corpus.)
)
________________________)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

CLIFF GARDNER
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Attorney for Petitioner
Joshua Richter

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INTRODUCTION

In the early morning hours of December 20, 1994, a shooting occurred at 4620 Fair Oaks Boulevard in Sacramento. One person -- Patrick Klein -- was killed while another --Joshua Johnson -- was injured. The state would later arrest, charge and convict Christian Branscombe and Joshua Richter for murder and attempted murder in connection with these shootings.

In a nutshell, the state's theory was this. The four teenagers had socialized earlier in the evening at Johnson's house. Branscombe borrowed a gun from Johnson, who had many. Early in the morning, Richter and Branscombe returned to commit a robbery. They entered the house and, in cold-blood, shot Klein as he slept on the couch. When Johnson awoke to find them in the course of the robbery, they shot him as well. They stole a safe Johnson had in the house and fled to Richter's house where the safe was found the next day by police. Johnson never fired a gun at either defendant that night.

The defense theory was far different. Richter and Branscombe did return to house, but only so Branscombe could return the gun he had borrowed. Richter dropped Branscombe off and, moments later, heard shooting. When he immediately rushed into the house, he saw Klein on the floor in the doorway between the living room and bedroom and Branscombe --standing with a gun in his hand --

yelling that they had tried to shoot him. Richter did have Johnson's safe at his house; in fact, it had been there several months at Johnson's request.

As this thumbnail sketch makes clear, there were three critical areas in which the state and defense versions differed. Under the state's version of events, (1) this was a robbery, Johnson fired no gun and there was no issue of self-defense, (2) Klein was shot in cold-blood on the couch and (3) the safe was taken that night from Johnson. In contrast, under the defense version (1) there was a struggle in the house, including at least one bullet fired at Branscombe, (2) Klein was shot not on the couch while asleep but during the struggle and in the doorway between the bedroom and living room and (3) the safe was not moved to Richter's house that night, but had been there for several months.

It is now clear that through a series of constitutional violations -- including the suppression of exculpatory evidence and the presentation of false testimony -- the jury charged with determining which of the two theories to believe did not hear a wealth of serological, ballistics, medical, blood spatter and lay testimony which it should have heard. As more fully discussed below, this testimony not only would have squarely supported the defense version of events and exposed Johnson's testimony as false, but it would have rebutted the state's theory of the case in each of the three critical areas discussed above. In light of this new evidence, the writ in this case must be granted.

STATEMENT OF THE CASE

On December 23, 1994, the Sacramento County District Attorney filed a four count information against petitioner Joshua Richter and a co-defendant, Christian Branscombe. (CT 1718.)[1] The information charged as follows:

> 1) Count one charged a December 20, 1994, murder in violation of section 187, adding an allegation that the murder occurred during a robbery in violation of section 190.2(a)(17). (CT 1718.)[1]
>
> 2) Count two alleged a December 20, 1994 attempted murder in violation of sections 187 and 664. (CT 1718.)
>
> 3) Count three alleged a December 20, 1994 burglary in violation of section 459. (CT 1718.)
>
> 4) Count four alleged a December 20, 1994 robbery in violation of section 211. (CT 1718.)

As to all four counts, the information added an allegation that both defendants personally used a firearm. (CT 1718.) Petitioner pled not guilty and denied the enhancing allegations. (CT 8.)

Trial began on November 14, 1995. On December 18, 1995, the jury found defendant guilty as charged. (CT 318-321.) The court sentenced defendant to a term of life without the possibility of parole for the count one offense, adding a consecutive seven year sentence for the attempted murder conviction. (CT 389.)

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[1] Citations to "CT" denote the Clerk's Transcript on Appeal, followed by the page reference. Citations to the Reporter's Transcript on Appeal are denoted "RT." All statutory references are to the Penal Code unless otherwise specified.

Petitioner timely filed a Notice of Appeal. (CT 400.) On March 20, 1998, the appellate court affirmed this conviction. This Court denied a timely Petition for Review on June 24, 1998.

STATEMENT OF FACTS

As noted above, the jury heard two very different versions of the events of December 20, 1994. From the state, the jury heard (1) this was a robbery, Johnson fired no gun and there was no issue of self-defense, (2) Klein was shot in cold-blood on the couch and (3) the safe was taken that night from Johnson. From the defense, the jury heard (1) there was a struggle in the house, including at least one bullet fired at Branscombe, (2) Klein was shot not on the couch while asleep but during the struggle in the bedroom and (3) the safe was not moved to Richter's house that night, but had been there for several months.

The state's case at trial had two prongs. First, the state presented Johnson's testimony about the events of that evening. Then the state presented corroborating forensic evidence. The defense relied primarily on Richter's own testimony. The defense presented no expert or forensic testimony to corroborate petitioner's testimony.

A. The Undisputed Facts Regarding The Early Evening Events Of December 19, 1994.

Although the parties disagree about the events which surround the shooting itself, there is little disagreement about the events which occurred earlier in the evening and the parties involved. Johnson lived at 4620 Fair Oaks Boulevard in Sacramento with Graham Sargent and Tony Hithe. (RT 467.) As Johnson admitted at trial (and Richter confirmed), his nickname was "Gunner" because of his]passion for guns. (RT 467, 1058.) Gunner had always "been into" guns and at the time of the shooting had two AK-47s, two shotguns and a .380 caliber Mac-12 which he carried with him for protection. (RT 481-482, 484, 533-534.)

Both Gunner and Richter were employed at the time of the shooting. Gunner confirmed that he was a marijuana dealer, selling large quantities of the drug. (RT 474, 480.) According to Gunner, the Fair Oaks Boulevard address was one where people "hung out" and smoked marijuana. (RT 474.) Richter -- along with Branscombe and Hithe –worked at a Christmas tree lot selling Christmas trees. (RT 499, 1069.)

Richter and Gunner had known each other for years and had become good friends after going to a Grateful Dead concert together. (RT 471-473, 1047.) Richter also had a friendship with Klein. (RT 1069.)

On the evening before the shooting, Richter and Branscombe went to Gunner's house in a car own by Richter's girlfriend's, Lauren Sullivan. (RT 1068.) Richter had gone to the house to pay Gunner some money he owed him, to give Hithe his pay from the Christmas tree lot where they both worked, and to buy some marijuana from Gunner. (RT 1069.)

When Richter and Branscombe drove to Gunner's house, no one was home, so they parked in the driveway to see if someone would return. (RT 1070.) Soon thereafter, Gunner, Klein and Noah Zonca drove into the driveway. (RT 1070.) When their car stopped, Gunner jumped out and approached Richter and Branscombe's car with a gun drawn. (RT 490, 1070.) Gunner recalled that the gun he pulled was the .380 Mac-12. (RT 490.) Richter realized that Gunner must not recognize Sullivan's car. (RT 1071.) Only after Branscombe identified himself did Gunn.er put his gun away. (RT 490, 1071.) Richter, Branscombe, Gunner, and Klein then all went into Gunner's house and Zonca drove away. (RT 492-494, 1071, 1072.)

The foursome spent the evening smoking marijuana and socializing. (RT 492-494, 1072-1073.) Branscombe cleaned a .32 caliber pistol that he was considering buying from Gunner. (RT 492-494, 1072-1073, 1233.) According to Richter, he paid Gunner the money he owed him. (RT 1073.) Richter and Branscombe left Gunner's house shortly after 2:30 a.m. (RT 504, 1080-1081.)

At this point, the versions presented by the state and defense begin to diverge.

B. Eyewitness Testimony To The Events Of December 20, 1994.

Two eyewitnesses testified to the early morning events of December 20, 1994: Gunner and Richter. Their accounts differ sharply.

1. Richter's testimony.

Richter and Branscombe went back to the Christmas tree lot to remove their belongings from a trailer they had been using. (RT 1081-1082.) They exchanged Sullivan's car for Richter's truck, went to the trailer, and loaded their belongings and those of Tony Hithe. (RT 1082, 1084.) They then returned to Gunner's house to see if Hithe had returned. (RT 1085.) They planned on giving Hithe his pay and belongings from the trailer and Branscombe had decided to return the .32 caliber pistol to Gunner. (RT 1085, 1233.)

They arrived at Gunner's house in the early morning hours. (RT 1086.) Richter stayed in the truck while Branscombe ran up to the house to see if Hithe had returned. (RT 1086.) Klein came to the front door and Branscombe went inside, closing the door behind him. (RT 1087.) Richter stayed in the car, smoking a cigarette. (RT 1087.)

About fifteen or twenty seconds later, Richter heard two gunshots and voices yelling. (RT 1087.) He got out of his truck and headed to the house. (RT 1088.) He heard voices yelling. (RT 1088.) As he ran, he heard several more shots. (RT 1089.)

When Richter entered the house, he saw Klein lying in the doorway between the bedroom and living room. (RT 1089.) The bedroom light was off, but he could see someone standing in the middle of the bedroom. (RT 1089.) Richter turned on the light and saw Branscombe standing with a gun in his hand. (RT 1090.) He was completely white. (RT 1090.) There was another gun on the floor about two feet away. (RT 1090.) Gunner was on the bed in a twisted position. (RT 1090.)

Richter screamed at Branscombe asking what happened. (RT 1090.) Branscombe "totally freaked out," yelling that they had shot at him and tried to kill him. (RT 1090-1091.) Branscombe picked the gun up off the floor -- it was Gunner's .380 Mac-12 – and ran out the front door holding the .32 caliber pistol in one hand and the Mac-12 in the other. (RT 1092.) Richter thought about calling 911, but when he heard Branscombe trying to start the truck, he panicked and ran out. (RT 1091-1092, 1100.)

In the truck, Branscombe kept repeating that Gunner had shot at him, that they had tried to kill him, and that he did not mean to shoot anybody. (RT 1235.) Richter realized he did not know what to do and he needed to talk to someone. (RT 1093.) They drove over to his girlfriend's apartment. (RT 1093.)

When they arrived, Branscombe stayed in the truck because he was still "freaking out." (RT 1093-1094.) Richter ran up to the apartment and woke up his girlfriend, Lauren Sullivan. (RT 1094.) At this point, he was in "chaos mode." (RT 1094.) Sullivan kept telling him to calm down and tell her what happened. (RT 1094.) All he could keep telling her was that he did not know what happened, but that people were shot and might be dead. (RT 1094.) He got so frustrated trying to explain that he just left her. (RT 1094) He decided to go back to the house to see if anyone was alive. (RT 1095.)

They drove straight back to the house. (RT 1095.) When they saw that the police were already there, they drove past the house and kept driving. (RT 1096.)

Richter decided to go somewhere where he could calm Branscombe down and figure out what happened. (RT 1109.) Branscombe was still "freaked out" and was mumbling. (RT 1108-1109.) Richter drove out to the desolated area of the Yolo overpass. (RT 1109.) On the way, Branscombe said that the Mac-12 had been thrown at him. (RT 1098, 1145.) When Richter asked him why the gun had been thrown at him, Branscombe jerked the lever for the receiver of the Mac-12 and ejected a shell onto the floor of the truck which had been jammed in the gun. (RT 1098-1099, 1145.)[2]

When they got to the Yolo overpass, they threw away both the .32 caliber pistol and the Mac-12. (RT 1102, 1145.) Joshua never saw a .22 caliber gun that morning. (RT 1133.)

The truck then got stuck in the mud and the battery failed. (RT 1113.) Unable to push it out, they walked to town to telephone Sullivan (Richter's girlfriend) and a tow truck. (RT 1113, 1115.) Sullivan told Richter that Klein was dead, that Gunner was alive, and that Richter was wanted by police as a witness. (RT 1132.)

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[2] Joshua testified that Gunner had made alterations to the Mac-12 in an attempt to change it from semi-automatic to fully automatic and that the gun jammed frequently (RT 1057) Prosecution ballistics expert Robert Garbutt continued that the Mac-12 had been altered in an attempt to make it fully automatic. (RT 786.) The gun had a missing circlip retainer which could cause the gun to fail to fire. (RT 785)

Police also corroborated Richter's testimony about the ejected shell, locating an ejected shell in the truck. (RT 385-386) Just as Richter testified, it was a spent 380 caliber casing, subsequent ballistics tests showed it had been fired from the Mac-12. (RT 773, 775.)

Back in town, Richter tried to contact the officer whose name Sullivan had given him. (RT 1126.) He then tried to call defense counsel Mark Axup because he wanted to go to the police with an attorney present. (RT 1097, 1132.) Richter was arrested while picking up the receiver. (RT 1097.)

2. Gunner Johnson's testimony.

At trial, Gunner presented a starkly different story to the jury. After Richter and Branscombe left that evening, he gave Klein a sleeping bag for the couch and then went to bed. (RT 503-504.) Later, he was awakened by noises in his bedroom. (RT 507.) He sat up in bed and saw Richter and Branscombe in his bedroom with his gun safe. (RT 507.) Branscombe had in his hand the .32 caliber pistol that he had been cleaning earlier that evening; he used it to shoot Gunner as he lay on the bed. (RT 507, 510, 602.)

Gunner was "not unconscious but knocked . . . down." (RT 510.) When he heard voices out in front of the house, he sat up and turned on his light. (RT 510-511.) He looked for his .380 Mac-12, which he had put on the nightstand prior to going to bed, but it was not there. (RT 511.) He then got out of bed, went into the living room, and locked the front door. (RT 513.) Seeing Klein lying on the couch, Gunner called 911. (RT 515.) Police arrived within minutes. (RT 516.)

C. Forensic Testimony And Physical Evidence The Jury Received Regarding The Events Of December 20, 1994.

The jury heard testimony on three different types of physical evidence. This evidence came entirely from the prosecution. First, the state presented ballistics evidence to rebut the self-defense claim made by the defense. Police testified that bullet holes found at the crime scene were from a .22 caliber gun. There was no evidence that Gunner had fired his .380 Mac-12. Second, the state presented serological evidence to rebut the theory that Klein was shot in the bedroom during a struggle and was the source of the blood pool found in the doorway between the bedroom and living room. A prosecution criminalist testified that Klein could be excluded as the possible donor of a blood sample taken near (but not from) the blood pool. Finally, the state presented evidence to rebut the theory that the safe was legitimately at Richter's home. Gunner and his friend, Scott Brown, testified that they took the safe back in late November or early December, well before the crime.

1. The ballistics.

During trial, the prosecutor apparently learned that there was a bullet hole in the floor of the bedroom at the Fair Oaks house. (RT 848.) On November 21, 1995 -- before Gunner testified at trial -- the prosecutor sent investigator Maloney to the house to "look[] for a hole that was apparently in the victim Gunner's -- the victim Johnson's bedroom." (RT 848.)

Maloney found the bullet hole in the bedroom floor, which he described as "consistent" with a .22 caliber gun. (RT 848.) He "noticed that the hole went all the way through" the floor. (RT 849.) Maloney then took a skill saw, cut a square of the floorboard around the hole, and watched the square of floorboard, in accordance with the laws of gravity, fall into the crawl space beneath the house. (RT 849.) Maloney testified under oath that there was no access to the crawl space under the house. (RT 854-855.) Thus, the square of floorboard was now lost. (RT 854-855.)

As noted above, Gunner admitted at trial that he carried a .380 Mac-12 for protection. (RT 484.) He also admitted that (1) earlier on the evening he had drawn this gun on Branscombe and Richter when he did not immediately recognize who they were, and (2) he put the .380 Mac-12 on his nightstand near his bed before going to sleep. (RT 490, 511.)

On November 27, 1995 -- six days after Maloney watched the square of floorboard fall to the ground beneath the house -- Gunner testified that he did not attempt to shoot Branscombe with the .380 Mac-12 on the night of the offense. (RT 590.) He explained that the bullet hole Maloney found had nothing to do with the case; it was caused when he (Gunner) accidently fired his .22 caliber rifle while cleaning it. (RT 554, 658.) There was no contrary expert testimony showing that bullet holes found at the crime scene were consistent with a .380 caliber gun.

The prosecutor took full advantage of this evidentiary gap. Ridiculing the defense theory that Gunner fired his .380 caliber Mac-12, the prosecutor argued that "it's reasonable with a guy with a Mac-12 semi automatic to get off at least one round if somebody is trying, if he's trying to shoot someone, **and we never ever saw a bullet hole in this room consistent with the Mac-12 being fired at them. There is nothing, nothing over here, nothing . . . .**" (RT 1635, emphasis added. See also RT 1432, 1627.)[3]

2. The blood.

Johnson testified that he lied in bed until his assailants left, then went to the living room, locked the door and called police. (RT 510-513.) Police arrived six minutes later. (RT 27.) In that six minutes, Johnson telephoned and spoke with his girlfriend's father. (RT 515-516.) After this call, he made two separate trips to hide material he used to grow marijuana. Johnson (1) went out of the living room, (2) through the kitchen, (3) into a side closet where he grabbed his marijuana plants (4) left the house by the back door, (5) ran outside to the south side of the house, and (6) threw the plants over the fence. (RT 515-517, 581.) Johnson repeated this route for the second trip. (RT 582.)

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[3] Nor did the defense present any evidence to show that the .380 Mac-12 gun had a tendency to jam. State criminalist Robert Garbutt confirmed at trial that the Mac-12 had indeed been modified. (RT 784-785.) Garbutt did not know if this modification could cause the gun to jam (RT 785.) Although the defense theory was that the Mac-12 jammed on the night of the offense (RT 1507-1508, 1510), it presented no expert testimony to support this theory. Once again, the prosecutor relied on the absence of such testimony in urging the jury to reject the defense and convict petitioner of first degree murder. (RT 1432, 1627, 1635.)

When police arrived after the shooting, they found Klein lying on the living room couch. (RT 32.) Richter testified that when he entered the house after hearing the shots, he saw Klein lying in the doorway between the bedroom and the living room. (RT 1089.) Significantly, police found a large pool of blood in the doorway between the bedroom and the living room in the precise spot where Richter saw Klein lying. See Photographs of Crime Scene, attached as Exhibit D.

During his closing argument, the prosecutor argued that Klein was shot on the couch in cold-blood, and that the pool of blood found in the bedroom was left by Gunner, not Klein. (RT 1637-1638, 1640, 1644-1645.) He argued that it was "reasonable" to believe that the pool of blood came solely from Gunner's wounds as he stood in the doorway bleeding. (RT 1637.) The defense argued that the pool of blood came from Klein, establishing that Richter was telling the truth and Gunner was lying.

It should have been easy to resolve this conflict. A blood sample from the large pool of blood in the bedroom could have been taken and tested. Yet for whatever reason, police never obtained a sample from this blood pool. (RT 937.) Instead, police noted the "fair amount of blood" at that location, then took a blood sample from a spattering of blood located on the nearby door molding, four inches off the floor. (RT 937.)

At trial, criminalist Jill Spriggs testified that she ran tests on this sample, as well as the blood of both Gunner and Klein. (RT 888.) Spriggs tested the sample to determine PGM type. (RT 888.) The PGM subtype of the sample was 2+1+. Spriggs further determined that Pat's blood was PGM subtype 1+ and Gunner's blood was PGM subtype 2+ 1+. (RT 890.) Spriggs testified that because the sample was 2+ 1+, "Patrick Klein could not have deposited that blood because I got a 2+ 1+, and he is a 1+ ." (RT 892.)

Defense counsel presented (1) no testimony contradicting Ms. Spriggs, (2) no expert medical testimony as to whether the blood pool found in the bedroom could possibly have resulted from the wounds Gunner received in light of his own testimony as to his location after the shooting, and (3) no blood spatter expert to examine photographs of the blood pool and render an opinion on whether Gunner's shoulder and cheek wounds could possibly have caused the blood pool.

3. The safe.

At trial, Gunner admitted that he kept his gun safe at Richter's prior to the December 20, 1994 shooting. (RT 483-484.) Gunner testified, however, that in the end of November or beginning of December, he and a friend moved the safe from Richter's back to Gunner's house. (RT 485.)[4]

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[4] Scott Brown testified that he was that friend. (RT

When police searched Richter's house on Gunn Road on December 20, 1994, they found Gunner's safe. (RT 424-425.) Thus, the state's theory was that after shooting Klein and Gunner, Richter and Branscombe moved the safe to Richter's home at 2405 Gunn Road. The defense theory was that the safe had been at the Gunn Road house with Gunner's permission all along.

D. Evidence The Jury Never Heard.

Because of a series of constitutional violations, the jury never heard a wealth of expert and lay testimony. Expert ballistics testimony would have shown that Gunner lied about the bullet in the floor; ballistics tests establish that the bullet hole in the floor was not caused by a .22 caliber, but a .380 caliber -- the very gun the defense had argued (but been unable to prove) Gunner had fired on the night of the shooting. A serological expert could have cast doubt on Ms. Spriggs's testimony; the PGM subtyping could **not** exclude Klein as a donor to the blood tested. Testimony from a forensic pathologist would have explained that because of the nature of Gunner's wounds, it was "highly unlikely" that Gunner was the source of the blood pool found in the doorway to the bedroom. A blood spatter expert would have further confirmed that this blood pool could not have come from Gunner as the prosecution argued. Finally, lay testimony was available to undercut the state's theory that Richter and Branscombe moved the safe on December 20th. The

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1304.) Brown testified that he helped move the safe in the first part of December. (RT 1304.)

jury charged with determining whether to believe Gunner or Richter never heard any of this evidence.

1. Ballistics evidence.

Prosecution witness Maloney testified under oath that there was no access to the crawl space under the house. (RT 854-855.) Thus, the square of floorboard he had cut out and watched drop to the ground beneath the house was lost. (RT 854-855.) Maloney's testimony was false. The crawlspace beneath the house was not inaccessible. The back of the house had a readily accessible opening to the crawl space. See Declaration of Dale Richter ("Richter Declaration"), attached as Exhibit A at para 4 and Attachment 2 to the Richter Declaration. After the verdict Mr. Richter visited the 4620 Fair Oaks house. He found the opening at the back of the house, near the kitchen door. The crawlspace is approximately 2 to 3 feet high. Richter Declaration at para. 4 and Attachment 2.

Mr. Richter crawled under the house and found the square piece of floorboard that Maloney had cut out and let fall through the floor. He photographed it exactly where he found it, along with the hole in the floor and the supporting beam to which Maloney referred. Richter Declaration at para. 5 and Attachment 3.

Mr. Richter took the square of floorboard and put it in a baggie. He then went into the house and took additional photographs of the hole, this time from the interior of the room as opposed to the crawlspace. He gave the square piece of floorboard to defense counsel Mark Axup. Richter Declaration at para. 6-7 and Attachment 4.

Several weeks later, Mr. Richter returned to the house. He cut out several sections of the floorboard adjacent to the hole which Maloney had cut out. One was a longer section several feet long. Another was much shorter. He gave these pieces of wood to Mr. Axup as well. Richter Declaration at para. 8. Mr. Axup gave the pieces of wood to ballistics expert James Aiello. Declaration of Mark Axup, attached as Exhibit B, at para. 10-12.

Mr. Aiello first measured the bullet hole in the square piece of floorboard. The measurements indicated that it was probably a .380 caliber rather than a .22 caliber. Declaration of James Aiello ("Aiello Declaration") attached as Exhibit C, at para. 3.

Mr. Aiello then tested a number of firearms on the longer strip of floorboard. He fired a .22 caliber rifle, using a Peters .22 cartridge. He also test fired a Russian Kalashnikov (AK47), a .45 caliber gun, a .380 caliber gun and a 9 millimeter. Aiello Declaration at para. 4.[5]

The bullet hole caused by Mr. Aiello shooting the .380 caliber measured the same as the bullet hole in the square piece of floorboard. Aiello Declaration at para. 5-6. The gun which fired the bullet into the square piece of floorboard was not a .22 caliber rifle, but a .380 caliber gun. Aiello Declaration at para. 6.

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[5] Among other weapons, Gunner owned two AK-47's, a 380 Mac-12, a Ruger .22 rifle, and a 9 millimeter handgun. (RT 325,437,451,481-482) A sales receipt made out to Gunner's name indicated that he had purchased Peters 22 caliber cartridges with the Ruger. (RT 437.)

This squarely contradicts Gunner's explanation for the bullet hole. It squarely supports the defense theory of the case.

The prosecutor never turned over to the defense the square piece of floorboard which Maloney cut out and allowed to drop into the crawl space. The prosecutor did not correct Maloney's false testimony that the crawl space was inaccessible. The jury never knew that expert testimony could have been presented showing that Gunner's explanation for the bullet hole in the floor was false. The jury never knew that expert testimony could have been presented to support the defense theory that Gunner's .380 Mac-12 was fired in the early morning hours of December 20th.

Nor did the jury ever hear expert ballistics testimony that Gunner's modification to the Mac-12 would indeed have a tendency to cause the Mac-12 to jam. (Declaration of Daniel Joseph, attached as Exhibit K, at para. 4.) In fact, the alteration Gunner made to the Mac-12 would "cause a failure to eject a spent cartridge and would prevent the gun from firing again." (Ibid.) This too would have squarely supported the theory defense counsel argued to the jury. (RT 1507-1508, 1510.)

2. Expert serological, medical and blood spatter evidence.

The prosecutor argued in closing that Klein was shot on the couch in cold-blood, and that the pool of blood found in the bedroom was left by Gunner, not Klein. (RT 1637-1638, 1640, 1644-1645.) He argued that it was "reasonable" to believe that the pool of blood came solely from Gunner's wounds as he stood in the doorway bleeding. (RT 1637.)

According to criminalist Spriggs, Klein could be excluded as having been a donor of blood found in a blood sample taken from the door molding above the blood pool. She reasoned that this was because the blood sample from the door was PGM subtype 2+ 1+, Klein was PGM subtype 1+, and Gunner was PGM subtype 2+1+. (RT 892.) According to expert testimony which would have been readily available at trial, however, Spriggs' conclusion is not scientifically reliable.

For Spriggs to conclude that Klein could not have deposited blood in the one sample she tested, the possibility of a mixture of stains would have to be discounted. However, the 1+ band in the 2+ 1+ sample appears at the same location as the 1+ band in a 1+ sample. Thus, in a sample where 2+ 1+ blood is mixed with 1+ blood, a finding of PGM subtype 2+ 1+ (as Spriggs found) could not exclude the possibility that the sample contains a mixture of 2+ 1+ and 1+ blood. Declaration of Dr. John Thornton, attached as Exhibit E, at para. 4. The jury never heard this evidence.

Nor did the jury hear expert medical and blood spatter evidence which would have wholly undercut the state's theory as to the offense. In fact, the prosecution's theory that the pool of blood came from Gunner's wounds is medically insupportable as well. See Declaration of Dr. Paul Herrmann, attached as Exhibit E, at para. 4-6. Given the nature of Gunner's wounds, Gunner's description of his activities and location in the six minutes before police arrived, and the fact that police did not notice that Gunner was injured until a conversation that took place several minutes after they first contacted him, it is "highly unlikely" that Gunner could have deposited the amount of blood found in the blood pool between the bedroom and living room. Herrmann Declaration at para. 4-6. From a medical standpoint, Gunner's testimony affirmatively undercuts the state's theory that he could have been standing in the doorway long enough to have deposited the amount of blood found in the blood pool when police arrived six minutes later. Herrmann Declaration at para. 6.

Even if Gunner had testified that instead of taking several trips outside the house to hide his marijuana operation he had simply stood still in the doorway between the bedroom and living room, as the prosecution's theory requires, the theory that the pool of blood came from Gunner's wounds would still not be scientifically reliable. See Declaration of Ken Moses, attached as Exhibit F, at para 6-9.

According to Mr. Moses, a stationary person dripping blood from a face and upper torso wound would create a large number of round splash drops -- known as satellite drops –surrounding the main pool of blood. There is no evidence of these drops or "blood into blood" pattern. Moses Declaration at para. 6-9; see Photographs of Crime Scene, attached as Exhibit

D. The lack of a large number of satellite droplets surrounding the pool eliminates the prosecution's theory that Gunner was standing into the doorway dripping into the pool below. Declaration of Ken Moses, at para. 6-9. Instead, the blood pattern in the doorway was caused by the pooling of the blood from a source close to or lying on the floor. The long spines of blood emanating from the pool are the result of an applied force on the pool such as from someone stepping in the blood. Moses Declaration at para. 6-9.

The jury never knew that expert testimony could have been presented undercutting Spriggs's conclusion that Klein could be excluded as a contributor to the sample of blood taken near the blood pool in the doorway. The jury never knew that testimony from a forensic pathologist would have established as medically and scientifically unreliable the prosecutor's theory that Gunner was the source of the blood pool. The jury never knew that testimony from a blood spatter expert would similarly have established that Gunner could not have deposited the blood found in the blood pool. In short, the jury never knew that the blood pool was deposited by Klein, not Gunner.

3. Lay testimony about the safe.

The state theorized that Johnson took the safe back in late November or early December; after stealing the safe in the early morning hours of December 20, 1994, Richter and Branscombe carried it into Richter's home on Gunn Road where police found it the next day. The jury never heard testimony from several witnesses that would have cast doubt on both prongs of the state's theory.

During the October and November of 1994, Madalyn Edwards was living with her sister Stephanie at Richter's Gunn road home. Richter lived in a converted living space in the garage. She moved out on December 3, 1994. In her visits back to the Gunn Road house from December 3 through 10, the safe was still there. Declaration of Madalyn Edwards, attached as Exhibit H, at para. 3-4.

Similarly, in 1994, both Shane Westburg and Linda Stewart lived in the house at 2405 Gunn Road. They had two "very good" watchdogs at the time who were kept in the kitchen directly across from the entrance to the garage living space where police found the safe. Both dogs would bark if anyone went down the walkway, in or out of the garage living space. Both Ms. Stewart and Mr. Westburg believe that if a safe had been moved into the garage living space in the early morning hours of December 20, 1994, the dogs would have barked and awakened them both. Declaration of Shane Westburg ("Westburg Declaration") attached as Exhibit I, at para. 2-3; Declaration of Linda Stewart, attached as Exhibit J, at para. 2-3. Mr. Westburg even recalls that at the time of the events he thought it was odd that the safe could have been moved into the garage area in the early morning hours without the dogs barking and waking him. Westburg Declaration at para. 4.

The jury never knew that lay testimony could have been presented showing the implausibility of the prosecution's theory that the safe was moved by Richter and Branscombe to the Gunn Road house in the early morning hours of December 20, 1994.

ARGUMENT

I. THE STATE WAS NOT FREE TO SUPPRESS EVIDENCE WHICH IMPEACHED ITS OWN STAR WITNESS AND DIRECTLY SUPPORTED THE DEFENSE THEORY OF THE CASE.

Gunner Johnson was the star witness for the state. In no uncertain terms, he testified that petitioner and Branscombe shot him and Klein in order to steal the safe. (RT 507,510.) Gunner unequivocally denied that Branscombe could have been firing in self-defense; he testified that he did not fire the .380 caliber Mac-12. (RT 590.)

In stark contrast, petitioner testified that he was not even in the house when the shooting occurred. (RT 1087.) When he heard shots and entered the house, Branscombe stated that Gunner had tried to shoot him. (RT 1090-1091.)

The jury's task in this case was simple. The jury was to determine who to believe: petitioner or Gunner Johnson.

In the middle of trial, police discovered a bullet hole in the floor of the Fair Oaks house. (RT 848.) Investigator Maloney looked in the bullet hole and "noticed that it went all the way through" the floor. (RT 849.)

In a scene which could have come out of the Keystone Cops, Maloney then took a skill saw, cut out a square of the floorboard which included the bullet hole, and watched as the forces of gravity caused the wood to fall into the crawlspace beneath the house. (RT 849.) Maloney then testified under oath that there was no access to this crawlspace. (RT 854-855.) Thus, the square piece of floorboard he had cut out was now lost. (RT 854-855.)

Maloney performed his disappearing act with the evidence on November 21, 1995 –in the middle of trial. (RT 848.) Six days later, Gunner testified that this bullet hole had nothing to do with the case; it was caused when he accidentally fired his .22 caliber rifle while cleaning it. (RT 554.) The prosecutor would rely on this testimony during his closing argument, repeatedly relying on the absence of any .380 caliber bullet holes to ridicule the defense theory that Gunner fired his .380 caliber Mac-12 on the morning of the shooting. (RT 1432, 1627, 1635.)

In fact, Maloney's testimony was false. Contrary to Maloney's testimony, the crawlspace beneath the house was not inaccessible, but readily accessible through an opening in the back of the house, near the kitchen door. (Richter Declaration at para. 4 and Attachment 2.) The crawlspace was approximately 2 to 3 feet high. (Richter Declaration at para. 4 and Attachment 2.)

The piece of wood Maloney claimed to be lost has now been obtained, photographed and tested. (Richter Declaration at para. 5-7 and Attachment 3; Axup Declaration at para. 10-12; Aiello Declaration at para. 3-6.) According to ballistics expert James Aiello, not only did an initial measurement of the bullet hole in the floorboard suggest that the bullet hole was from a .380 caliber gun, but when he compared the bullet hole to bullets test fired from a .22 caliber rifle, a Russian Kalashnikov (AK47), a .45 caliber gun, a .380 caliber gun and a 9 millimeter, the test results showed that the bullet hole caused by the .380 caliber gun measured the same as the bullet hole in the square piece of floorboard. (Aiello Declaration at para. 3-6.) In Mr. Aiello's professional opinion, the gun which fired the bullet into the square piece of floorboard he examined was not a .22 caliber, but a .380 caliber. (Aiello Declaration at para. 6.)

The prosecutor never turned over the piece of floorboard which Maloney cut out and allowed to drop to the crawl space. The prosecutor did not correct Maloney's false testimony that the crawl space was inaccessible. The jury never knew that expert testimony could have been presented showing that Gunner's explanation for the bullet hole was false. The jury never knew that expert testimony could have been presented that supported the defense theory that another gun was fired that night.

Neither petitioner nor the jury knew the truth about Maloney's testimony, the ballistics or Gunner's lie. As more fully discussed below, a new trial is required.

The Due Process Clause of the federal constitution requires the prosecution in a criminal case to disclose all substantial material evidence favorable to an accused, including evidence relating to the credibility of a material witness. (Brady v. Maryland (1963) 373 U.S. 83, 87.) Where a defendant is convicted at a trial in which such evidence has been suppressed by the state, Due Process has been violated and reversal is required. (Kyles v. Whitley (1995) 514 U.S. 419, 435-436.) Once it is determined that material evidence was suppressed, there is no further harmless error analysis to be done. (Kyles v. Whitley, supra, 514 U.S. at pp. 435-436.) This is because the determination that certain evidence was "material" -- and could not properly be suppressed -- embraces a conclusion that the defendant has been prejudiced. (Ibid.)

Thus, the question to be resolved in this case is whether the state was free to suppress the square piece of floorboard. If suppression was appropriate, Mr. Richter's conviction may stand. On the other hand, if disclosure of the evidence was required, reversal is required.

As the Supreme Court has recently observed in this very context, establishing that evidence is "favorable" to an accused -- and that it must therefore be disclosed -- does not require a defendant to show that had the evidence been disclosed, there would have been insufficient evidence for a conviction. (Kyles v. Whitley, supra, 514 U.S. at pp. 434-435 and n.8.) Instead, in determining whether evidence is favorable (and must therefore be disclosed), "the question is not whether the defendant would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (Ibid.) Any evidence which "undermines confidence in the outcome of the trial" is favorable and must be disclosed. (United States v.

Bagley (1985) 473 U.S. 667, 678. Accord Kyles v. Whitley, supra, 514 U.S. at p. 434.) Evidence need not impeach every government witness for disclosure to be warranted; if it impeaches a significant part of the state's case, it may not be kept hidden from the defense. (Kyles v. Whitley, supra, 514 U.S. at pp. 441-454.)

In Kyles v. Whitley, supra, for example, the Court held that disclosure was required where evidence impeached the testimony of two eyewitnesses, notwithstanding that the evidence did not in any way impeach the testimony of the state's two remaining eyewitnesses. There, defendant was convicted of murder. At trial, four eyewitnesses identified defendant as the killer. In addition, the state presented physical evidence which connected defendant to the crime, including the murder weapon which was found in defendant's kitchen and the victim's purse found in defendant's garbage. The state suppressed evidence of pretrial statements made by two of the four eyewitnesses which were ultimately inconsistent with their trial testimony. Although these statements did not in any way impeach the testimony of the two remaining eyewitnesses, the Court held disclosure of the statements was required because "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others . . . ." (514 U.S. at p. 445.)

Here, the critical witness against defendant was Gunner Johnson. Gunner's testimony was flatly inconsistent with the defense theory that the shootings occurred in self-defense. Gunner testified that he had not fired the .380 caliber Mac-12 on December 20th. (RT 590.) Gunner explained the bullet hole in the floorboard in a way that was entirely consistent with his testimony and that of prosecution witness Maloney; he had accidentally fired a bullet into the floor while cleaning his .22 caliber gun. (RT 554, 658.)

Had Maloney not buried the evidence beneath the house, and then testified falsely about access to this evidence, the jury would have known that Gunner lied. The bullet in the floor was not from a .22 caliber gun, it was from a .380 caliber. This would have directly supported the defense theory of the case because Gunner himself admitted he kept a .380 caliber Mac-12 on his nightstand. (RT 511.) The presence of at least one bullet hole at the crime scene consistent with Gunner's personal weaponry strongly supports Branscombe's panicked declaration to Richter that Gunner had tried to shoot him. (RT 1087.)

Given what is now known about the floorboard, and like the evidence involved in Kyles, this evidence was plainly favorable to Mr. Richter's defense. It seems clear that the evidence was relevant to assess Gunner's testimony. Gunner lied about how the bullet got in the floor. Equally important, the fact that Gunner would lie about this -- and the caliber of the bullet itself -- both strongly support an inference that some kind of struggle did take place in the Fair Oaks house that night, just as Branscombe said. The evidence should not have been hidden beneath the house; it should have been disclosed. Indeed, if disclosure was required in Kyles

-- where the suppressed evidence did not affect the identification testimony of two eyewitnesses -- disclosure is required here a fortiori. In this case, Gunner was the only eyewitness to the offense. The writ must be granted.

II. THE STATE'S AFFIRMATIVE INTRODUCTION OF FALSE TESTIMONY FROM MALONEY THAT EXCULPATORY EVIDENCE WAS EFFECTIVELY LOST WAS AN EGREGIOUS VIOLATION OF MR. RICHTER'S RIGHT TO A FAIR TRIAL.

In the middle of trial, the prosecutor learned of a bullet hole in the floor of the Fair Oaks house. (RT 848.) The prosecutor sent investigator Maloney to investigate. (RT 848.)

As noted above, Maloney found a bullet hole in the floor, cut the square piece of floorboard containing the bullet hole out and watched as it fell beneath the house. (RT 849.) Maloney then returned to court and on direct examination by the prosecutor testified under oath that there was no access to the crawl-space under the house. (RT 854-855.) Thus, the piece of floorboard he had cut out was effectively lost. (RT 854-855.)

Maloney's testimony was false. Contrary to Maloney's testimony, the crawlspace beneath the house was not inaccessible, but readily accessible through an opening in the back of the house, near the kitchen door. (Richter Declaration at para. 4 and Attachment 2.)

The prosecutor never corrected Maloney's false testimony. Instead, the prosecutor capitalized on it, ridiculing the defense theory that Gunner fired his .380 caliber Mac-12 by arguing that if Gunner had fired the Mac-12, there would have been a bullet hole to prove it. "[I]t's reasonable with a guy with a Mac-

12 semi automatic to get off at least one round if somebody is trying, if he's trying to shoot someone, **and we never ever saw a bullet hole in this room consistent with the Mac-12 being fired at them. There is nothing, nothing over here, nothing . . . .**" (RT 1635, emphasis added. See also RT 1432, 1627.)

Neither the jury nor petitioner knew. that the floorboard evidence was not lost. Neither the jury nor petitioner knew that the evidence could have been retrieved and tested. Neither the jury nor petitioner knew that the prosecutor's argument was false.

Separate and apart from the Due Process violation discussed in Argument I, supra, the prosecutor's introduction and reliance on this false evidence independently requires that the writ be granted. In addition to the constitutional obligation to disclose favorable evidence recognized in Brady v. Maryland, supra, the Due Process Clause also imposes upon the prosecution a distinct and in some respects more basic duty to correct any testimony of its own witnesses which it knew, or should have known, was false or misleading. (United States v. Agurs (1976) 427 U.S. 97, 103-104.) A conviction obtained through the use of such false or misleading testimony or argument must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (United States v. Agurs, supra, 427 U.S. at p. 103.)

Here, a new trial is plainly required under this case law. Under direct examination, Maloney presented false testimony as to whether critical evidence in this case could be obtained. He told the jury that without tearing the siding off the Fair Oaks house, there was no access to the crawl space into which the floorboard had fallen. (RT 854-855.) The prosecutor stood silently by and allowed this testimony to go uncorrected to the jury even though the record makes clear that the prosecutor himself visited the Fair Oaks house on at least one occasion and so presumably knew -- or should have known -- that this testimony was false. (RT 846-847.)

For many of the same reasons discussed above, this falsehood required that the writ be granted. On the one hand, the jury evaluating Gunner's credibility did not know that expert testimony could have been presented showing that his explanation about the bullet hole in the floor was false. This jury would have known that expert testimony could have been presented which supported the defense theory that a struggle had taken place, and that Gunner had fired the .380 caliber gun which he admitted carrying. Given that Johnson was the only eyewitness to the crime, there is certainly a "reasonable likelihood" that this false testimony as to his credibility "could have affected the judgment of the jury." (United States v. Agurs, supra, 427 U.S. at p. 103.) The writ should be granted.

III. DEFENSE COUNSEL'S FAILURE TO PRESENT TESTIMONY FROM READILY AVAILABLE SEROLOGICAL, MEDICAL AND BLOOD SPATTER EXPERTS AND LAY WITNESSES WHO WOULD ALL HAVE DIRECTLY SUPPORTED MR. RICHTER'S TESTIMONY, AND HIS MAKING OF PROMISES TO THE JURY IN OPENING STATEMENTS WHICH HE NEVER KEPT, VIOLATED MR. RICHTER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Expert And Lay Testimony The Jury Never Heard.

As discussed above, the state's theory of the case was that Branscombe and Richter both entered the house with the intent to steal a safe which Gunner owned and both were involved in the shootings. According to this theory, Klein was shot in cold blood as he lay sleeping on the couch. After stealing the safe, Richter and Branscombe took it to Richter's home on Gunn Road.

The defense theory was that Gunner fired the .380 Mac-12 at Branscombe during a struggle; when the Mac-12 jammed, Gunner picked up and fired his .22 caliber. (RT 1507- 1508, 1515.) Branscombe fired in self-defense, and Richter entered the house after the shooting had occurred. According to this theory, Klein was not asleep on the couch, but was shot in the living room and carried to the couch by Gunner before police arrived. Defendant testified at trial that when he entered the house, he saw Klein lying in the doorway between the bedroom and living room. (RT 1089.)

The photographic evidence appeared to support petitioner's testimony as to Klein's location. Photographs taken by police show a pool of blood located between the bedroom and living room, where Richter had said he saw Klein lying when he entered the house. (Photographs of Crime Scene, attached as Exhibit D.)[6]

The prosecutor responded to this evidence in two ways. First, he called criminalist Jill Spriggs to testify about blood tests she ran on the blood spatter found several inches above the pool of blood as well tests she performed on the blood of both Gunner and Klein. Klein was PGM subtype 1+ . Gunner was PGM subtype 2+ 1+. The blood sample taken from the spatter several inches above the pool was PGM subtype 2+ 1+ . Spriggs testified that Klein could be excluded as a potential donor of this blood. (RT 888-892.)

Second, and based on this evidence, the prosecutor argued that the pool of blood was left by Gunner. He argued that it was "reasonable" to believe that Gunner had bled into the pool while he was standing by the bedroom door after the shooting and before police arrived. (RT 1637.)

Yet it is now clear that defense counsel could have presented expert testimony which would have explained to the jury that Ms. Spriggs's conclusion was not scientifically reliable. The 1+ band in a 2+ 1+ sample appears at the same location as the 1+ band in a 1+ sample. Thus, in a sample where a 2+ 1+ blood is mixed with 1+ blood, a finding of PGM subtype 2+ 1+ (as Ms. Spriggs found) could not exclude the possibility that the sample contains a mixture of 2+ 1+ and 1+ blood. Thornton Declaration at para. 4. Thus, Klein could not be excluded as a donor to the pool of blood.

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[6] Police never obtained a sample from this pool of blood in the doorway. (RT 937) Instead, police took a sample from a spattering of blood located on a nearby door molding, four inches above the floor. (RT 937.)

Moreover, expert medical testimony could also have been presented to rebut the prosecutor's argument that Gunner deposited the blood found in the blood pool while standing by the bedroom door. After examination of photographs of the blood pool, photographs of Gunner's wounds, and Gunner's own testimony about his location and movements after the shooting, forensic pathologist Dr. Paul Herrmann would have testified that it is "highly unlikely" that Gunner could have been the source of the blood found in the blood pool. Herrmann Declaration at para. 4-6.[7]

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[7] This forensic conclusion is entirely consistent with Gunner's own testimony Gunner testified that he was shot while lying in bed. (RT 510.) He was "knocked . . . down." (RT 510.) When he heard voices outside the house, he sat up and turned on his light (RT 511.) He then got out of bed, went into the living room and locked the front door. (RT 513.)

Gunner testified that from there, he called 911, using the telephone by the couch. (RT 513.) After dialing 911, he called his girlfriend. (RT 515.) Johnson testified that "two or three" minutes passed between his 911 call and the arrival of police (RT 516.) Police records reflect that the 911 call came in at 5.00 a m. and police arrived at 5:06 a.m.

In addition to this expert serologic and medical testimony, a blood spatter expert would also have confirmed the fundamental implausibility of the state's theory. The pattern in the blood pool is inconsistent with the state's theory that Gunner's cheek and shoulder wounds were the source of this blood. Moses Declaration at para. 6-9. In fact, the pattern seen in the blood pool is actually consistent with the defense theory that it was caused by Klein lying on the floor in the doorway. Moses Declaration at 6-9.

Defense counsel could also have presented expert ballistics evidence to support the defense theory. In fact, the modifications made to the Mac-12 would cause the gun to jam. Joseph Declaration at para. 4. This was exactly the theory defense counsel argued to the jury, albeit without any expert testimony. (RT 1507-1508, 1510.) Indeed, the prosecutor relied on the absence of any such testimony in urging the jury to reject the defense theory. (RT 1432, 1627, 1635.)

In that six minute period, Johnson dialed and had a conversation with his girlfriend's father. He then made two trips out of the house to get rid of material he used to grow marijuana. (RT 515-516.) He went through the living room and kitchen to a side closet, grabbed the plants (one at a time), went through the back door and around the south side of the house, and threw them over the fence (RT 516-517,581.) He repeated this route for the second trip. (RT 582.) When police arrived at the house, they spoke with Johnson for at least several minutes before they even realized that he too had been shot. (RT 36-38.)

Thus, Gunner himself never even claimed to be standing in the bedroom for the length of time it would have been necessary to drip the amount of blood found in the blood pool.

Finally, defense counsel could also have presented lay testimony undercutting the state's theory that Gunner retrieved his safe from Richter's home in late November or early December and Richter and Branscombe moved the safe to Gunn Road after the shooting. Madalyn Edwards would have placed the safe at the Gunn Road house as late as December 10th. Shane Westburg and Linda Stewart would have explained how unlikely it was that Branscombe and Richter could have brought the safe back to Gunn Road unnoticed on the morning of December 20th.

All of this evidence was available. None of it went to the jury.

B. Defense Counsel's Broken Promises.

Mark Axup, trial counsel for defendant, made an opening statement on November 20, 1995. Mr. Axup made a series of promises to the jury .

Mr. Axup said he would call firearms experts to prove that the .380 caliber Mac-12 jammed. (Aug. RT 33.) He did not.

Mr. Axup said he would call Linda Stewart to prove that only a few days before the December 20th shooting, Gunner had come by Richter's house and asked if he could come in the house and access his safe. (Aug. RT 32.) He did not.

Mr. Axup said he would prove that Gunner's house was filled with "methamphetamine or cocaine." (Aug. RT 38.) He did not.

Mr. Axup said he would prove that Patrick Klein's fingerprints were on the safe. (Aug. RT 31-32.) He did not.

Mr. Axup said he would prove that earlier on the evening of the shooting, Gunner ordered Branscombe and defendant out of a car at gunpoint. (Aug. RT 24.) He did not.

In his closing argument, the prosecutor told the jury it should "not mistake Mr. Axup's opening statement for evidence." (RT 1357.) In urging the jury to find petitioner guilty of first degree murder, the prosecutor again and again focused on the promises defense counsel had made in his opening statement but did not keep. Thus, the prosecutor relied on the fact that defense counsel (1) presented no firearms experts showing that the .380 caliber Mac-12 jammed, (2) had never called Linda Stewart to testify (RT 1361), (3) presented no evidence showing the presence of methamphetamine or cocaine (RT 1362), (4) presented no evidence showing that Klein's fingerprints were not on the safe (RT 1358), and (5) presented no evidence showing Gunner ordered Branscombe and petitioner out of a car at gunpoint. (RT 1360.)

C. Defense Counsel's Failure To Present The Lay And Expert Testimony, And The Broken Promises Made By Trial Counsel During His Opening Statement, Denied Mr. Richter Effective Assistance Of Counsel And A Fair Trial.

Both the United States and California Constitutions accord defendants in criminal cases a right to the assistance of counsel. (United States Constitution, Amendment 6; California Constitution, Article 1, Section 15.) This right "guarantees that a criminal defendant will not be convicted without the effective assistance of counsel." (Harris v. Reed (7th Cir. 1990) 894 F.2d 871, 877; see Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319.)

When a criminal defendant seeks relief because his counsel has provided deficient representation, two elements must be proven. (Strickland v. Washington (1984) 466 U. S. 668, 687.) The defendant must show (1) counsel's performance fell below an "objective standard of reasonableness," and (2) but for counsel's errors there is a "reasonable probability" that the result of the proceeding would have been different. (466 U.S. at pp. 688, 693.) "Reasonable probability" does not require defendants to show that "counsel's conduct more likely than not altered the outcome in the case." (Strickland v. Washington, supra, 466 U.S. at p. 693.) Instead, reasonable probability is merely "a probability sufficient to undermine confidence in the outcome." (466 U. S. at p. 694.) In this case, both prongs have been established and relief is appropriate.

1. Counsel's performance fell below the standard of care required by the Sixth Amendment.

Here, Richter testified that when he entered the house, Klein was lying on the floor in the doorway between the bedroom and living room. (RT

1089.) This was fully consistent with defense counsel's theory -- as explained to the jury during opening statements – that Klein was not asleep on the couch when shot, but was involved in a struggle. (Aug. RT 33.) It was also consistent with the blood pool depicted in the crime scene photographs. The state rebutted this theory with expert testimony from a criminalist and with an argument which explained that Gunner could have deposited the blood seen in the photograph.

As is now clear, however, significant additional evidence could have added on this critical point. Defense counsel could have introduced expert serological testimony that the state criminalist was wrong in excluding Klein based on the results of her PGM subtyping. Thornton Declaration at para. 4. Defense counsel could have introduced expert medical testimony that it was "highly unlikely" that Gunner could have deposited the blood found in the blood pool. Herrmann Declaration at para. 4-6. Defense counsel could have introduced expert blood spatter testimony that not only "eliminated" Gunner as the source of the blood pool, but strongly suggests that the patterns found in the blood pool were consistent with a theory that Klein as the source of the blood. Moses Declaration at para. 6-9. There was no conceivable tactical reason for counsel to have failed to introduce this evidence.

Similarly, counsel could have had no tactical reason for failing to present expert testimony that the Mac-12 did, in fact, have a tendency to jam. He had promised such evidence in his opening statement. (Aug. RT 33.) He relied on this theory in his closing argument. (R T 1507-1508, 1515.) The prosecutor skewered the defense for breaking this promise and not presenting such testimony. (RT 1627, 1635.)

Nor could counsel have had a tactical reason for failing to present testimony from Madalyn Edwards, Shane Westburg or Linda Stewart. If defendant could have casted doubt upon Gunner's testimony that he picked up the safe from Richter's house in late November or early December, and brought it back on the morning of the crime, the state's theory as to the robbery would have been completely undermined. These three witnesses would have done just that.

Finally, counsel's promise to produce certain testimony during the opening statement, and his complete failure to produce that evidence, is also below the standard of care required by the Sixth Amendment. (People v. Corona (1969) 80 Cal.App.3d 684, 719; Anderson v. Butler (1st Cir. 1988) 858 F.2d 16, 17-19. Harris v. Reed, supra, 894 F.2d at pp. 878-879.) This is just what happened here; counsel made a series of specific promises to the jury which he did not keep. He promised witnesses he did not call and physical evidence he did not produce. In closing arguments, the prosecutor again and again reminded the jury of these broken promises. (RT 1358, 1360, 1361, 1362, 1432, 1627, 1635.)[8]

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[8] To be sure, there are instances where counsel is surprised and must make a strategic choice to alter the theory of the case, even after certain promises were made in the opening Federal cases have upheld convictions in instances where counsel failed to fulfill the . promises made in an opening

Here, examining counsel's errors collectively, it seems plain that counsel's performance fell below an "objective standard of reasonableness" envisioned in Strickland. The remaining inquiry is whether counsel's conduct prejudiced the defendant.

2. Counsel's failure to present the expert and lay testimony, and his decision to promise evidence in opening statements which he did not ultimately produce, undermines confidence in the outcome of trial.

The jury in this case was forced to choose between the version of events presented by Gunner Johnson and Joshua Richter. As discussed in Arguments I and II, supra, and through no fault of defense counsel, the jury did not know that Gunner had lied about the bullet in the floor. The jury did not know that expert ballistics testimony could have been introduced showing that Gunner lied. The jury did not know that this same evidence would have supported defendant's theory of the shootings.

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statement where events at trial warranted a change of strategy or where counsel explained the change to the jury so that the damaging inferences could be avoided (See, e.g. United States v. McGill (1st Cir. 1993) 11 F.3d 223, 227; McAleese v Mazurkiewicz (3rd Cir. 1993) 1 F.3d 159, 166-168; United States v. Bailey (7th Cir 1984) 734 F.2d 296, 305.) But here, no explanation was given to the jury, they were just left with the "speaking silence" of defense counsel's dramatic, unfulfilled opening remarks Further, there is no support in this record for the conclusion that counsel's actions were based on tactical reasons.

The jury also did not know that the state's theory of how the blood pool got on the floor was not only "highly unlikely" from a medical perspective, but could actually be "eliminate[d]" from consideration by a blood spatter expert. The jury did not know that expert testimony could have been presented countering the testimony of the state's only serological witness. The jury did not know that expert testimony could have been presented that the Mac-12 **did** have a tendency to jam. The jury did not know that a series of witnesses could have cast doubt on Gunner's testimony about the safe. Moreover, absent defense counsel's errors, the prosecutor would not have been able to make a closing argument which had as a major theme defense counsel's broken promises.

In Anderson v. Butler, supra, and Harris v. Reed, supra, the courts reversed convictions recognizing the significance of broken promises alone. Here, the broken promises are combined with far more serious violations: the failure to present a series of expert and lay witnesses who would have rebutted the state's case and directly supported the defense theory. Under the circumstance, the series of blunders -- combined with the state's suppression of the square piece of floorboard and presentation of false testimony – plainly "undermine confidence in the outcome" of trial. The writ should be granted.

IV. THE TRIAL COURT VIOLATED MR. RICHTER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY OVERRULING DEFENSE COUNSEL'S TIMELY OBJECTION AND ALLOWING THE JURY TO CONVICT PETITIONER ON A THEORY OF FELONY-MURDER NOT PERMITTED UNDER STATE LAW.

At trial, petitioner testified that he did not enter the Fair Oaks house (where the shooting occurred) until after the shooting had already occurred. (RT 1087-1089.) Instead, he was out in the car at the time of the shooting. (RT 1087-1089.) Because the state's theory was that both defendants were involved in a robbery of the safe at the time of the shootings, the court instructed the jury on the felony-murder rule, giving a general instruction which told the jury that a killing which occurred during the course of a robbery was first degree murder. (RT 1680.)

During deliberations, the jury asked the court for a "clarification" of this exact instruction:

> "Clarification of Instructions:
>
> "If a defendant is found guilty of Robbery & Burglary in the first degree, it is our understanding that this necessarily leads to a guilty verdict of murder in the first degree if a human being is killed during the commission of the above Robbery and Burglary.

> "Also, if a defendant is found to have aided and abetted in the above Robbery/Burglary, is he guilty of all charges (or can you (sic) find him guilty of lesser charges) as found for the other defendant." (Aug. CT 1.)

The trial court consulted with counsel on December 15, 1995. (CT 316.) This conference was not placed on the appellate record. (RT 1711.)

At this conference, the trial court advised counsel it was considering answering the question "yes." (Axup Declaration at para. 6.) Defense counsel objected, arguing that the jury's question went to the timing of petitioner's complicity in the underlying robbery. (Axup Declaration at para. 6.) Counsel argued that if the jury believed petitioner's testimony that he did not enter the house until after the shootings, it could believe he was not involved in the robbery until after the fatal wounds had been inflicted. (Axup Declaration at para. 6.) In this circumstance, the petitioner would not be guilty of first degree murder under the felony murder rule. (Axup Declaration at para. 6.) The court overruled defense counsel's objection and instructed the jury that if it found defendant guilty of robbery, he was necessarily guilty of first degree murder if a human being was killed during the course of the robbery. (Axup Declaration at para. 6; Aug. CT 1.)

As a matter of state law, the court's instruction was wrong. If a jury finds that a defendant joins an underlying felony after a fatal wound has been inflicted by a coperpetrator of the felony, then the jury may not find the defendant guilty of felony murder. (People v. Pulido (1997) 15 Cal.4th 713.) In Pulido this Court held that under state law, felony murder "liability does not extend to a homicide completed before the accomplice's participation in the robbery began . . . ." (15 Cal.4th at p. 722.)

In Pulido, the Court found this error harmless because in finding the robbery special circumstance true, the jury had found that defendant had committed the robbery during the commission of the murder. (15 Cal.4th at pp. 726-727.) Here, however, in instructing the jury on the special circumstance allegation, the trial court gave the jury a written instruction explaining that the special circumstance could be found true if "[t]he murder was committed while [the] [a] defendant was engaged in the commission or attempted commission of a robbery." (CT 268.) Under this instruction, and in stark contrast to Pulido, the jury here did not necessarily decide that defendant's participation in the robbery occurred prior to the fatal wounds having been inflicted. Under the court's instructions, the jury could have convicted defendant on the special circumstance allegation simply because the murder occurred when "a defendant" -- not necessarily petitioner himself -- was involved in a robbery.

In short, the trial court's refusal to properly answer the jury's question permitted the jury to convict petitioner based on a theory of culpability which does not exist under state law. This violated petitioner's state and federal rights to a jury trial and Due Process; the writ must be granted. (See Suniga v. Bunnell (9th Cir. 1993) 998 F.2d 664 [defendant charged with murder, in addition to proper theory of culpability, jury was presented with a felony-murder theory which did not exist under state law, jury returned general verdict of guilt; held, reversal required in the absence of a verdict which affirmatively showed that jury relied on the untainted theory].)[9]

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[9] Each of the issues raised in the accompanying habeas petition and discussed in this memorandum is based on facts outside the record on appeal. Thus, each is properly included in this habeas petition. However, to the extent the Court deems that appellate counsel has somehow waived the right to pursue any of these issues, petitioner's right to the effective assistance of appellate counsel has been violated.

In this regard, petitioner had the right to the effective assistance of counsel in his appeal. (Pennsylvania v. Finley (1987) 481 U.S. 551; Evitts v. Lucey (1985) 469 U.S. 387.) Questions of ineffective assistance of counsel do not turn on the quality of the individual lawyer, but upon the specific issue involved. "[E]ven an isolated error" by an otherwise well-regarded and diligent counsel may comprise a violation of the right to counsel "if that error is sufficiently egregious and prejudicial." (Murray v. Carrier (1986) 477 U. S. 478,496)

The issues set forth in this petition are all meritorious. Therefore, if appellate counsel has somehow waived petitioner's right to seek relief, she did so without tactical reason.

CONCLUSION

For a variety of reasons, the adversary system failed in this case. Whether or not it was intentional, a prosecution witness gave false testimony which prevented the jury from learning that there was a .380 caliber bullet hole in the floor of Gunner's bedroom at the Fair Oaks house. This evidence would have proven that Gunner was lying when he claimed that the bullet hole was from an unrelated incident with a .22 caliber gun. It would have undercut the state's theory that no struggle and gun battle occurred. It would have directly supported the self-defense theory forwarded by petitioner. The prosecutor did not correct this false testimony, nor did he disclose the exculpatory evidence itself.

This is not all the jury did not hear. The jury did not hear a medical expert who concluded that the state's theory of this case was "highly unlikely." It did not hear a blood spatter expert who concluded that the state's theory actually could be "eliminate[d]." It did not hear expert serological testimony contradicting the state's criminalist. It did not hear expert testimony that the Mac-12 did have a tendency to jam. It did not hear several lay witnesses who could have undercut the state's theory as to the safe.

Layered on top of what the jury did not hear is what the jury did hear. The jury heard a series of empty promises from defense counsel. It heard a prosecutor's closing argument which had -- as a major theme -- the idea that defense counsel had not proven what he said he would prove. Finally, the jury heard a description of the law on felony murder which this Court has already held to be fundamentally incorrect. (People v. Pulido, supra, 15 Cal.4th 713.)

Considered either singly, or in combination with each other, this Court cannot have confidence in the outcome of this trial. The writ should be granted.

DATED: 9/13/99 .

Respectfully submitted,

CLIFF GARDNER

By Cliff Gardner
Attorney for Petitioner

Exhibit A

DECLARATION OF DALE RICHTER

I, Dale Richter, declare as follows:

1) I am the father of Joshua Richter, defendant in People v. Richter. I attended much of the trial in this case.

2) During the trial, district attorney's investigator Brian Maloney testified that he pulled up a carpet in the bedroom of the Fair Oaks house and found a bullet hole. He testified that the bullet itself was not in the floor; the bullet had gone all the way through the floorboard. Investigator Maloney took a "skill saw" to the floor and cut the piece of wood with the bullet hole out of the floor. The piece of wood fell below the floor. Maloney saw that the bullet had gone through the floorboard and hit a beam under the floor only a few inches away.

3) Maloney testified that the house was on a concrete pad, and the siding of the house came all the way down to the concrete pad. Thus, he testified that it was impossible to get beneath the house without cutting a section of siding out, which he did not do. Attached to this declaration as Attachment 1 are pages from the Reporter's Transcript where investigator Maloney provided this testimony. I was in court for this testimony.

4) After the verdict, I visited the Fair Oaks house. Maloney was wrong. The crawlspace beneath the house was accessible through the back of the house, near the kitchen door. The crawlspace was approximately 2 to 3 feet high. Attached to this

declaration as Attachment 2 are photographs of the back of the Fair Oaks house showing the crawl space access under the house. Several of these photographs were taken by the American River Fire Department after a fire at the Fair Oaks house on February 4, 1996. Attached as Attachment 3 to this declaration is an incident narrative prepared by the American River Fire Department about this fire and concluding that the fire "appeared to have been set."

5) Mark Axup, my son's trial attorney, told me to see if I could find the piece of wood cut out by Maloney. With the permission of the home owner, I crawled under the house. Underneath the bedroom I found the piece of wood Maloney had cut out. I photographed it exactly where I found it, along with the hole in the floor and the supporting beam to which Maloney referred. A copy of these photographs is attached to this declaration as Attachment 4.

6) I took the piece of wood and put it in a baggie. I then went in the house and took additional photo-graphs of the hole, this time from the interior of the room as opposed to the crawl space. A copy of these photographs is attached to this declaration as Attachment 5.

7) I gave the piece of wood to Mark Axup.

8) Several weeks later I went back to the house. I went under the house with a metal detector to see if I could locate a bullet. I was unable to do so.

9) I went inside the house and cut out several sections of the floorboard adjacent to the hole

which Maloney had cut out. One was a longer section several feet long. Another was much shorter. I gave these pieces of wood to Mark Axup as well.

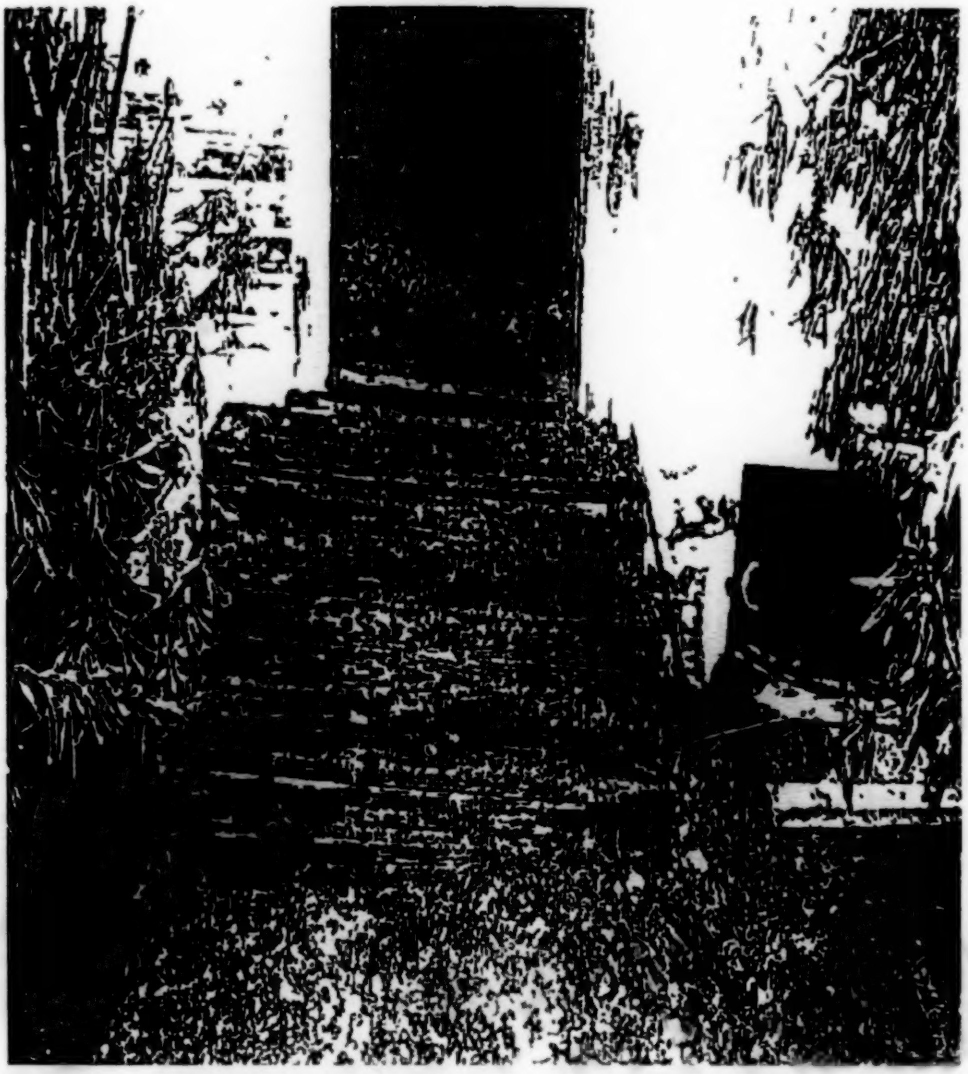
I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

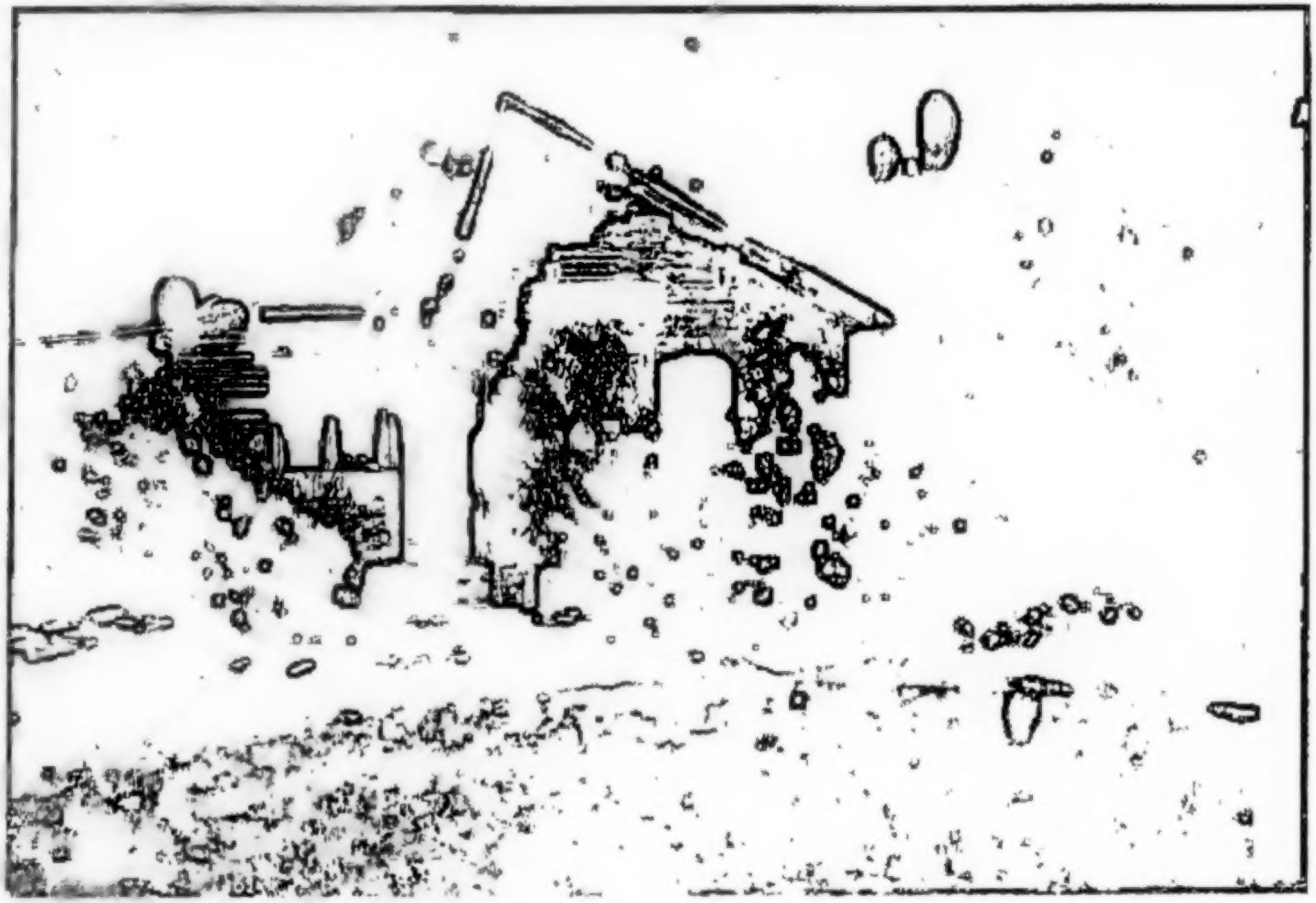
Executed this 6th day of September in San Francisco, California.

/s/
Dale Richter

ATTACHMENT 2

BEST AVAILABLE COPY





ATTACHMENT 3

American River Fire District
INCIDENT REPORT 24-009851 (001795) Page 1

Date: 02/04/96 Call back: None
Time recvd: 0137 Arr: 0143 C/4: Shutoff: 0324
Amb. arr: N/A
Dispatched alarm type: STRUCTURE RESPONSE
Actual alarm type: RESIDENTIAL STRUCTURE
Location: 4620 FAIR OAKS BL
Battalion: 08
ARFD Fire Apparatus: E110 E107 TR109
Non Rpt. FD Units:
FMS/LAW/FD Staff: BC8 24FPB
Received from: Business Line SRFECC
Zone: 110107R4 TB Map: 299A3
Incident commander: 1162 PIETRUSZKA, ROBERT
Title: Battalion Chief
Report by: 1162 PIETRUSZKA, ROBERT
Entered by: 50RYP Updated by: Checked by:

American River Fire District
INCIDENT NARRATIVE 24-009851 (001795) Page 2

Responded code three to a reported structure fire. E110 arrived and reported heavy involvement to the rear of a single family dwelling. See individual company reports for specific operations. Upon my arrival I positioned my vehicle to the west of the scene for traffic protection and assumed command. After a brief time, E110 reported that this appeared to be a vacant, abandoned home and there was no life threat. I relayed this information to Dispatch. Utilities were secured and shortly thereafter, a code 4 was given. I went up to the building and surveyed the scene. This building utilized the old "knob and Tube" type of wiring and the service drop from the power pole entered into the building through holes cut in the siding. There was no visible way to insure that the power lines in the wall were not energized. I placed a call for SMUD to disconnect the power lines at the pole. The technician arrived and removed the service drop to the structure. This fire appeared to have been set so I placed a call for Fire Prevention. Inspector McKinnon arrived and I assisted him in his investigation. All apparatus went in service and returned to quarters. I shut off the call. The dwelling was a single story, single family, ordinary construction structure. Fire was confined to the rear of the building.

American River Fire District
RUN REPORT 2427 24-009851 (001795) Page 3
Company: 2427
Personnel:
1219 MCKINNON, GEORGE T JR.

Conditions on arrival:
Move-up for coverage? N
Id: 2427
First arrival: N Forced entry: N Returned en route: N
Where: By:
Responsible officer: 1219 MCKINNON, GEORGE T JR.
Entered by: 22GTM Updated by:

American River Fire District
RUN NARRATIVE 2427 24-009851 (001795) Page 4

I (INSP. T. MCKINNON, BADGE NO. 632) WAS DISPATCHED FROM OFF-DUTY STATUS TO RESPOND TO THIS INCIDENT TO CONDUCT A CAUSE AND ORIGIN INVESTIGATION. I ARRIVED AT THE REPORTED ADDRESS AND MET WITH THE INCIDENT COMMANDER, BATTALION CHIEF R. PIETRUSZKA, WHO PROVIDED A SYNOPSIS OF THE EVENTS PERTAINING TO THIS INCIDENT. I THEN PROCEEDED TO PROCESS THE FIRE SCENE. THE CAUSE OF THIS FIRE WAS DETERMINED AS INCENDIARY. FOR FUR THE FORMATION SEE INVESTIGATION SECTION CASE FILE NO. 96-009.

American River Fire District
RUN REPORT E107 24-009851 (001795) Page 5

Company: E107 Id: 2439
Personnel:
1104 KLOPFENSTEIN, GARY W.
1272 FINGERLE, ARTHUR C. JR.
)159 WEATHERLY, BARTON G.
Conditions on arrival: VISIBLE FLAMES AND E110 O.S.
Move-up for coverage? N
First arrival: N Forced entry: N Returned en route: N
Where: By:
Responsible officer: 1104 KLOPFENSTEIN, GARY W.
Entered by: 20GWK Updated by:

American River Fire District
RUN NARRATIVE E107 24-009851 (001795) Page 6

E107 RETURNED TO SERVICE.
E107 RESPONDED TO FAIR OAKS FROM QUARTERS . . E110 ARRIVED FIRST AND REPORTED VISIBLE FLAMES. E107 ARRIVED AND SUPPLIED E110 FROM THE HYDRANT AT 4650 FAIR OAKS.
E107 CREW USING A SECOND 1.5" LINE FROM E110 ATTACKED THE FIRE AND COMPLETED A PRIMARY SEARCH. E107 ENTERED THE STRUCTURE FROM THE REAR DOOR. NOTHING WAS FOUND DURING THE SEARCH. THE HOUSE APPEARED TO BE VACANT. THE FRONT DOOR WAS FORCED OPEN FROM THE INSIDE TO ASSIST WITH SMOKE REMOVAL.

E107 PICKED UP EQUIPMENT AND WAS RELEASED FROM THE SCENE.

E107 WENT TO 106 FOR AIR BOTTLES.

E107 RETURNED TO SERVICE AT STATION 107.

American River Fire District
RUN REPORT E110 24-009851 (001795) Page 7

Company: E110 Id: 2456
Personnel:
1178 REBOL, TYRONE F.
1291 DEUTSCH, MICHAEL R.
1133 BLOUNT, THOMAS F
Conditions on arrival: FLAME FROM REAR OF STRUCTURE
Move-up for coverage? N

First arrival: Y Forced entry: N Returned en route: N
Where: By:
Responsible officer:
Entered by: 20TFR
1178 REBOL, TYRONE F.
Updated by:

American River Fire District
RUN NARRATIVE E110 24-009851 (001795) Page 8

E110 RESPONDED CODE THREE TO A REPORT OF FLAMES FROM THE ROOF AT 4620 FAIR OAKS BLVD. WE REPORTED OUR ARRIVAL, HEAVY SMOKE FROM A SINGLE FAMILY RESIDENCE, MOVE TO TAC6, E107 TO PROVIDE WATER, E110 TO BEGIN FIRE ATTACK.

WE USED 1 1/2" TRANSVERSE LINE TO ATTACK FIRE AT THE SOUTH END OF BUILDING. FIRE WAS INSIDE THE DOORWAY (OPENED) AND IN THE ATTIC (BURNED THROUGH THE GABLE). FIRE WAS CONFINED TO REAR OF BUILDING. EXTINGUISHMENT WAS ROUTINE. SEARCH COMPLETED. NEITHER PERSONS NOR CONTENTS FOUND. WE REPORTED STATUS TO BC8 AND REQUESTED ASSISTANCE WITH LIGHTING AND VENTILATION. WE BEGAN MOP UP AS CREWS ARRIVED AND ASSISTED WITH MOP UP AND VENTILATION. WE SUGGESTED THE NEED FOR FIRE PREVENTION TO BC8.

WE ASSISTED PICKING UP ALL HOSE AND EQUIPMENT. WE LEFT FIRE PREVENTION AND BCB ON SCENE, REPORTED AOR AND RETURNED TO QUARTERS.

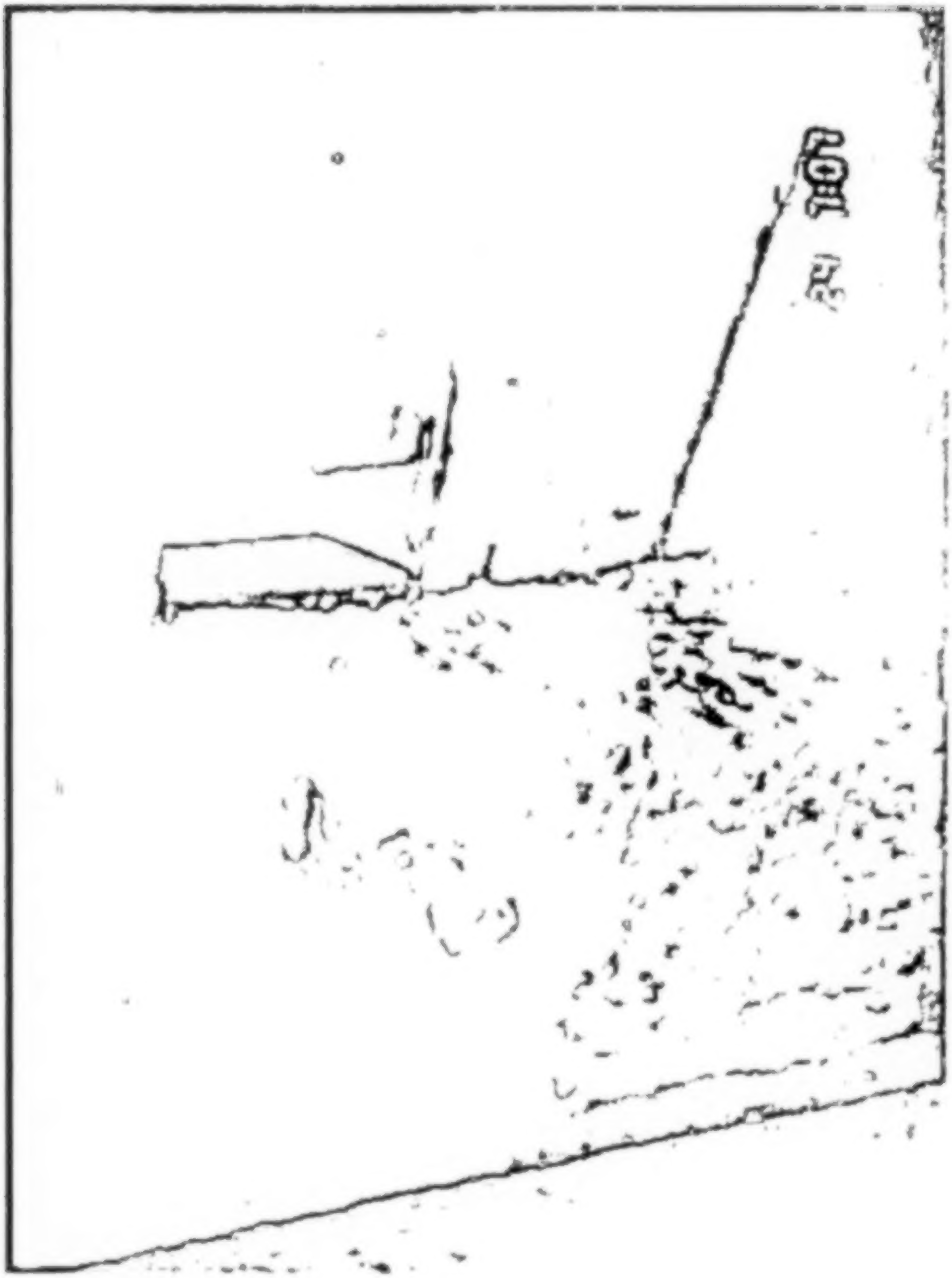
American River Fire District
RUN REPORT TR109 24-009851 (001795) Page 9

Company: TR109
Personnel:
1017 FERRY, ROBERT BRUCE
1258 WIGGINTON, MICHAEL K.
1279 WUDELL, FRED
Conditions on arrival:
Move-up for coverage? N
First arrival: N Forced entry:
Where: By:
Id: 2441
1257 STEPHENS, JEFF
N Returned en route: N
By:
Responsible officer: 1017 FERRY, ROBERT BRUCE
Entered by: 20RBF Updated by:

American ,River Fire District
RUN NARRATIVE TR109 24-009851 (001795) Page 10

CR109 RESPONDED FOR A STRUCTURE FIRE. UPON ARRIVAL THIS COMPANY LADDERED THE ROOF OF A ONE STORY SFD. THIS COMPANY WAS ADVISED BY THE IC THAT ROOF VENTILATION WAS NOT NEEDED. THIS COMPANY SECURED UTILITIES AND ASSISTED E110 CREW WITH OVERHAUL OPERATIONS. RELEASED BY IC. 10-8/10-19

ATTACHMENT 4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ATTACHMENT 5

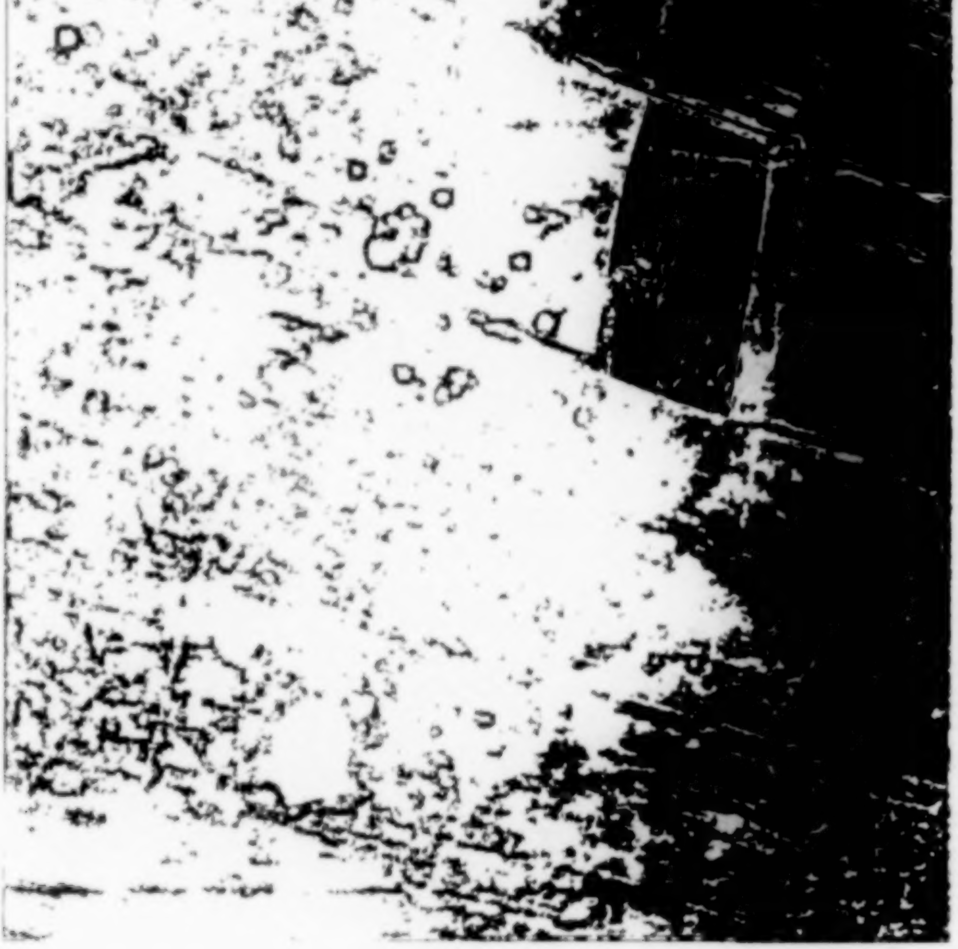


Exhibit B
DECLARATION OF MARK AXUP

I, Mark AXUP, declare as follows:

1) I am an attorney licensed to practice in California. I represented defendant Joshua Richler in People v. Richter.

2) At trial, the court instructed the jury on the felony murder rule, advising the jury that a killing which occurred during the course of a robbery was first degree murder.

3) Joshua Richter had testified at trial that he did not enter the Fair Oaks house (where the shooting occurred) until after the shooting.

4) During jury deliberations, the jury asked the court for a "clarification" of the felony murder rule, explaining the jury's view that "[i]f a defendant is found guilty of Robbery &Burglary in the first degree, it is our understanding that this necessarily leads to a guilty verdict of murder in the first degree if a human being is killed during the commission of the above Robbery and Burglary."

5) Before responding, and out of the presence of the court reporter, the trial court consulted with counsel. This conference was never placed on the record.

6) At this conference, the trial court advised us it was considering answering the question "yes." I objected, arguing that the jury's question

went to the timing of petitioner's complicity in the underlying robbery. I argued that if the jury believed defendant's testimony that he did not enter the house until after the shootings, it could believe he was not involved in the robbery until after the fatal wounds had been inflicted. In this circumstance, the defendant would not be guilty of first degree murder under the felony murder rule. The court overruled my objection and answered the jury's question "yes."

7) During the trial, district attorney's investigator Brian Maloney testified that he pulled up a carpet in the bedroom of the Fair Oaks house and found a bullet hole. He testified that the bullet itself was not in the floor; the bullet had gone all the way through the floorboard. Maloney took a "skill saw" to the floor and cut the piece of wood with the bullet hole out of the floor. The piece of wood fell below the floor. Maloney saw that the bullet had gone through the floorboard and hit a beam under the floor only a few inches away.

8) Maloney testified that the house was on a concrete pad, and the siding of the house came all the way down to the concrete pad. Thus, he testified that it was impossible to get beneath the house without cutting a section of siding out, which he did not do. Attached to this declaration as Attachment 1 are pages from the Reporter's Transcript where investigator Maloney provided this testimony.

9) Sometime after this testimony, Dale Richter – Joshua's father -- advised me that he had visited the Fair Oaks house and Maloney's testimony was false. Mr. Richter advised me that the house was

accessible through the back of the house, near the kitchen door.

10) I advised Mr. Richter to see if he could find the piece of wood cut out by Maloney. Within several weeks, Mr. Richter returned to my office with a piece of wood which had a bullet hole in it. The wood was in a baggie.

11) Several weeks later, Mr. Richter gave me several other pieces of matching wood. He advised me that he had been inside the Fair Oaks house and cut out several sections of the floorboard adjacent to the hole which Maloney had cut out. He gave me these pieces of wood.

12) I gave the small piece of wood with the bullet hole in it and the longer piece of adjacent floorboard to James Aiello for a ballistics examination.

13) Mr. - Aiello later reported to me that the bullet. hole in the small piece of wood was from a .380 caliber gun.

14) I did not have this information until after Joshua Richter had been sentenced.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 14 day of September in Sacramento, California.

/s/

Mark Axup

Exhibit C

DECLARATION OF JAMES AIELLO

I, James Aiello, declare as follows:

1) I am a former police officer and Chief of Police. I have had training, and testified as an expert, in the field of ballistics. I am a licensed private investigator, certified to instruct on firearms. Attached to this declaration as Attachment 1 is a copy of my Curriculum Vitae.

2) I was retained by Mark Axup, trial counsel for Joshua Richter. Mr. Axup provided me with two pieces of wood floorboard. One was a small square several inches on a side which had what I was told was a bullet hole in it. The other was a strip several feet long without any holes in it. Mr. Axup informed me that the longer strip had been adjacent to the shorter square containing the bullet hole. Mr. Axup also informed me that a prosecution witness had testified that the hole in the smaller piece of wood was caused by his accidental firing of a .22 caliber rifle bullet into the floor while cleaning the gun.

3) I measured the bullet hole in the small square piece of wood. The measurements indicated that it was probably a .380 caliber rather than a .22 caliber.

4) I then tested a number of firearms on the longer strip. I fired a .22 caliber rifle, using a Peters .22 cartridge. I also test fired a Russian Kalashnikov (AK47), a .45 caliber gun, a .380 caliber

gun and a 9 millimeter. The .380 caliber testing included a .380 hollow point and a .380 full jacket slug.

5) The test results showed that the bullet hole caused by the .380 caliber hollow point measured the same as the bullet hole in the small square piece of wood.

6) My professional opinion is that the gun which fired the bullet into the small square piece of wood I examined was not a .22 caliber rifle, but a .380 caliber gun.

7) I prepared a report detailing my findings and gave it to Mark Axup's secretary. I also returned to her the two pieces of wood. The computer on which I prepared the report has since "crashed" and my copy of the report cannot be accessed.

8) I would have been available to testify to this if called as a witness at defendant's trial.

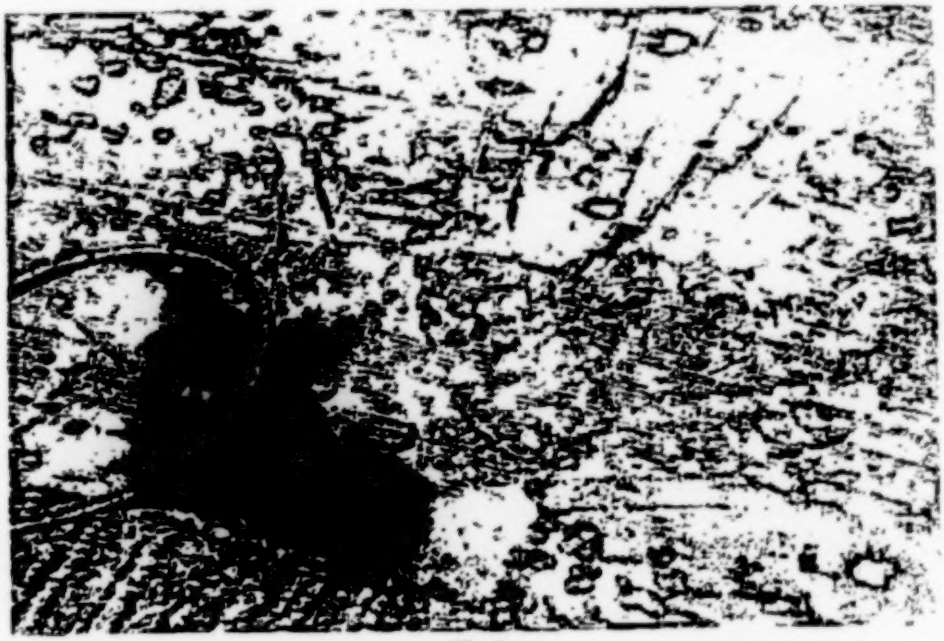
I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 7 day of September in Sacramento, California.

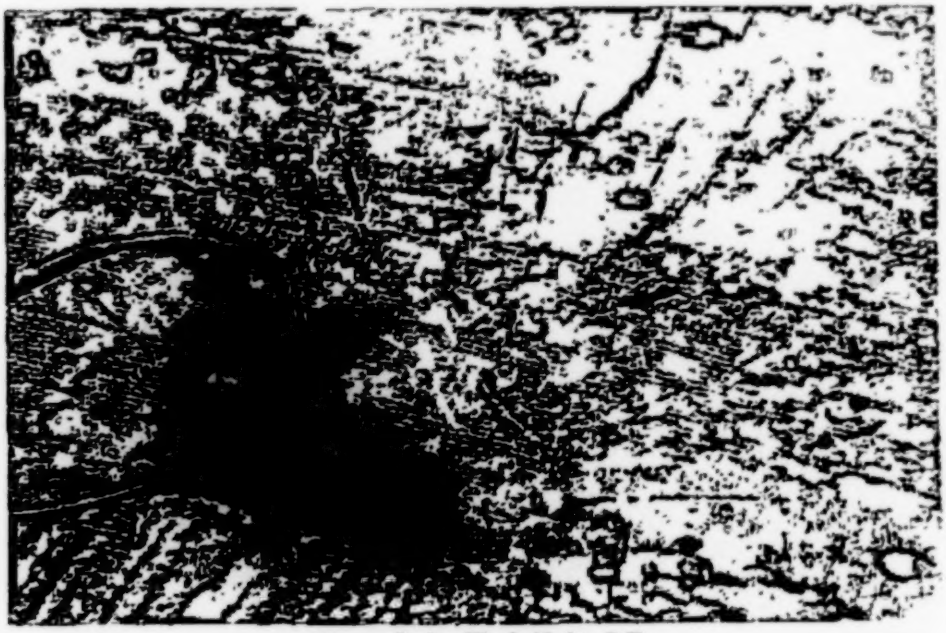
/s/

James Aiello

Exhibit D



R-8



People's Exhibit 37

Exhibit E
DECLARATION OF JOHN THORNTON

I, Dr. John Thornton, declare as follows:

1) I am a Senior Forensic scientist at Forensic Analytical, a crime laboratory with offices in Hayward, Los Angeles, and Minneapolis/St. Paul. Attached to this declaration as Attachment 1 is a copy of my Curriculum Vitae.

2) From 1963 through 1972, I was a criminalist with the Contra Costa Sheriff's department in Martinez, California; from 1970-1994 I was a Professor of Forensic Sciences at the University of California at Berkeley. From 1994 through the present I have been an Emeritus Professor of Forensic Science at the University of California at Berkeley. The attached CV details my education, professional experience, presentations, and other relevant information.

3} In the summer of 1999, I was retained in the case of People y, Richter. I have been provided with, and have reviewed the testimony of criminalist Jill Spriggs. Ms. Spriggs tested a blood sample identified as 14-A to determine PGM type. She determined that the sample contained PGM subtype 2+1~. She tested blood from Patrick Klein and found it to be PGM subtype 1+. Finally, she tested blood from Joshua Johnson and found it to be PGM subtype 2+1+. Ms. Spriggs testified that because the sample in Exhibit 14-A was 2+1+, "Patrick Klein could not have deposited that blood because I got a 2-+1+, and he is a. 1+."

4) For this conclusion to he valid under any and all circumstances, the possibility of a mixture of stains would have to be discounted. This is because in the electrophoretic separation of PGM subtypes, the 1+ band in a 2+1+ sample appears at the same location as the 1~ band in a 1+ sample. Thus, in a sample where a 2+1+ blood is mixed with 1+ blood, a finding of PGM subtype 2+1+ (as Ms. Spriggs found) could not exclude the possibility that the sample contains a mixture of 2+1+ and 1+ blood.

5) I would have been available to testify to this if called as a witness at defendant's trial.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 7th day of September in Hayward, California.

/s/

Dr. John Thornton

Exhibit F

DECLARATION OF DR. PAUL HERRMANN

I, Paul Herrmann, declare as follows:

1) I am a medical doctor, forensic pathologist and Director of the Institute of Forensic Sciences. I have been board certified in forensic pathology since 1971. I am a forensic pathologist for Alameda County and have been a Clinical Professor in the Department of Pathology at Stanford University Medical Center since 1994. Attached to this declaration .a Attachment 1 is a copy of ~ curriculum Vitae.

2) I have been retained to examine certain materials and render an opinion in People v. Richter. Counsel for Mr. Richter has provided me with (1) crime scene photographs of the pool of blood found in the doorway between the bedroom and the living room: (2) photographs of Joshua "Gunner" Johnson's gunshot wounds; (3) A transcript of testimony from attending physician Dr. David Wisner regarding Johnson's injuries; (4) a transcript of testimony from Kr. Johnson regarding his actions in the house after being shot and until police arrived; (5) a transcript of testimony from Deputy Michael Wright regarding his observations of Mr. Johnson upon first contact; and (6) the autopsy report prepared in the case.

3) I have been informed that the prosecution's theory in this case was that the pool of blood deposited in the doorway between the bedroom and living room came from Mr. Johnson's wounds.

This theory is scientifically unreliable for the following reasons:

4) First, Dr. Wisner testified that Mr. Johnson was shot in the right shoulder, with entrance and exit wounds. This testimony does not support the state's theory because the amount of blood likely to result from such a wound would be minimal. Further, Detective Wright testified that he did not notice that Mr. Johnson was injured until a conversation that took place several minutes after first contacting Mr. Johnson and only after he had Mr. Johnson take his shirt off. Given my experience. if Mr. Johnson had been bleeding so profusely as to have deposited the pool of blood on the floor between the living room and the bedroom, it is unlikely that Detective Wright would have been oblivious to the injury.

5) Second, Dr. Wiener testified that Mr. Johnson was shot in the cheek. Once again. Detective Wright's testimony that he did not notice that Mr. Johnson was injured until a conversation that took place several minutes after first contacting Mr. Johnson, and only after he had Mr. Johnson take his shirt off, undercuts a conclusion that the amount of blood from the cheek wound in this ease was substantial.

6) Finally, Gunner Johnson's own description of his actions in the minutes between the shooting and the arrival of police undercuts the state's theory. Nothing in his testimony suggests he was ever standing in the doorway long enough to create the pool of blood that was deposited. Given Mr. Johnson's testimony and the amount of blood likely

to result from the wounds which he received, and the short time between Mr. Johnson being shot and Detective Wright making his observations of Mr. Johnson, it is highly unlikely that the blood pool found in the doorway between the bedroom and living room was caused by Mr. Johnson's wounds.

7) I would have been available to testify to this if called .s a witness at Mr. Richter's trial.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 8th day of September in Oakland, California.

/s/
Dr. Paul Herrmann

Exhibit G
DECLARATION OF KEN MOSES

I, Ken Moses, declare as follows:

1) I am a Forensic Criminologist with over thirty years of experience in the study of bloodstain analysis.

2) I attended courses on this subject taught by Professor Paul Kirk at the University of California at Berkeley in the mid-1960's. Professor Kirk's investigation of the Sam Sheppard Murder Case in Cleveland was the pioneer work in this field and formed the basis of his lectures. In 1981, I attended Professor Hebert MacDonnell's Bloodstain Evidence Institute at Elmira College, New York, and thereafter assisted professor MacDonnell in conducting six Institutes in California.

3) As an Inspector-Sergeant and senior crime scene investigator with the San Francisco Police Department Crime Laboratory. I investigated hundreds of violent crimes over a twenty-eight year period in which I applied the science of bloodstain pattern interpretation. I have been qualified and have testified on numerous occasions as an expert on the subject of bloodstain pattern interpretation in the Superior Courts.

4) Now, as Director of Forensic Identification Services, I consult with attorneys on Crime Scene Investigations including the interpretation of blood Patter evidence. I continue to update my know-ledge through attendance at

seminars on bloodstain pattern interpretation. Attached to this declaration as Attachment 1 is a copy of my Curriculum Vitae.

5) I have been retained to examine certain materials and render an opinion in People v. Richter. Counsel for Mr. Richter had provided me with (1) crime scene photographs of the pool of blood found in the doorway between the bedroom and the living room; (2) photographs of Joshua "Gunner" Johnson's gunshot wounds; (3) • transcript of testimony from attending physician Dr. David Wisner regarding Johnson's injuries; (4) a transcript of testimony from Mr. Johnson regarding his actions in the house after being shot and until police arrived; (5) a transcript of testimony from Deputy Michael Wright regarding his observations of Mr. Johnson upon first contact; and (6) the autopsy report prepared in the case.

6) I have been informed that the prosecution's theory in this case was that the pool of blood deposited in the doorway between the bedroom and living room came from Mr. Johnson's wounds as he stood in the doorway bleeding. This theory is scientifically unreliable for the following reasons.

7) The pool of blood in the crime scene photographs appears to be of significant volume. If it had been caused by a person standing and dripping from a face and upper torso wound, the resulting pattern of blood dripping into a pool would have created a large number of round splash drops (satellite drops) surrounding the main pool of blood. There is no evidence of these drops or -blood into blood- pattern.

8) The blood pattern shown in the photos was caused by the pooling of the blood from a source close to or lying on the floor. The long spines of blood emanating from the pool are the result of an applied force on the pool such as from someone stepping in the blood.

9) Under the prosecution's theory that Mr. Johnson was standing in the doorway with wounds bleeding from his upper body, there would be a completely different blood pattern, such as the -blood into blood- pattern described in paragraph 7 above. The lack of a large number of satellite droplets surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing into the doorway dripping into the pool below.

10) I would have been available to testify to this if called as a witness at Mr. Richter's trial.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 10th day of September in San Francisco, California.

/s/
Ken Moses

Exhibit H

DECLARATION OF MADALYN EDWARDS

I, Madalyn Edwards, declare as follows:

1) In September of 1994 , I lived in the Santa Cruz area. In the beginning of October, I moved to Carmichael and began looking for work in Sacramento. I lived at 2405 Gunn Road, the same house at which Joshua Richter lived. I moved with my sister, Stephanie Edwards.

2) At the Gunn Road house, we lived in a converted garage. It contained a small room at the end of the garage in which I kept a number of my possessions. The small room had a door into the larger section of the garage which had a bed and several pieces of furniture. Located opposite the door was a large metal safe, approximately four and 1/2 to 5 ft high by one d one-half feet wide. I was told that this safe belonged to Gunner Johnson, a friend of Joshua's. I did not know what was in the safe; I used it as a shelf to put clothes on.

3) I live in the garage throughout October as I searched for a job. I found a job at the end of October and began work the first part of November. During November, I stayed at the Gunn Road house as well as the house of a friend in downtown Sacramento who lived closer to my place of work.

4) I found an apartment in downtown Sacramento and moved on the weekend of December 3, 1994. I am certain of this date because I keep a detailed daily journal and made an entry on that day about the move. I recall visiting the Gunn Road

house again after that on several occasions to complete the move and believe that because of my work schedule, these visits would have been in the evening of Dec 5th – Dec 10th, 1994.

5) On neither visit was the safe gone. Because of the prominence of the safe, had it been gone, I would have noticed it.

6) I would have been available to testify to this if called as a witness at defendant's trial. No-one from the defense team ever spoke with me about this issue prior to trial.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 6th day of September in Arcata, California.

/s/

Madalyn Edwards

Exhibit I

DECLARATION OF SHANE WESTBURG

I, Shane Westburg, declare as follows:

1) In 1994, I lived at 2405 Gunn Road in Carmichael. This was the same location at which Joshua Richter lived. He lived in the garage which had been converted into living apace. I lived in the house with Linda Stewart, along with our young son and two watch dogs. The house was immediately adjacent to the garage.

2) The dogs were kept in the kitchen of the house. The kitchen was next to a walkway. The entryway to the garage living space is directly across from the kitchen where the dogs stayed. Both dogs were good watch dogs and would bark if anyone walked down the walkway, in or out of the garage living space.

3) If a safe were moved into the garage living space in the early morning hours of December 20, 1994, I believe the dogs would have barked and both Linda and I would have been awakened. Not only did this never happen, but I remember at the time of the events thinking that it was odd that the safe was moved into the garage area in the early morning hours without the dogs barking and waking me.

4) I was interviewed by police after the shooting. I was never interviewed by a defense lawyer or investigator.

5) I would have been available to testify to these facts if called as a witness at defendant's trial.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 13 day of September in Sacramento, California.

/s/
Shane Westburg

Exhibit J
DECLARATION OF LINDA STEWART

I, Linda Stewart, declare as follows:

1) In 1994, I lived at 2405 Gunn Road in Carmichael. This was the same location where Joshua Richter lived. He lived in the garage which had been converted into living space.

2) I lived in the house with Shane Westburg, along with our young son and two large dogs. The house was immediately adjacent to the garage.

3) If a safe were moved into the garage living space in the early morning hours of December 20, 1994, I believe the dogs would have barked and both Shane and I would have been awakened.

4) I would have been available to testify to these facts if called as a witness at defendant's trial.

I declare under penalty of perjury that the foregoing is true to the beat of my knowledge.

Executed this 13 day of September in Davis, California.

/s/
Linda Stewart

Exhibit K
DECLARATION OF DANIEL JOSEPH

I, Daniel Joseph, declare:

1) I am a firearms and ballistics expert. I have qualified and testified as a ballistics expert in several California counties, the State of Georgia and Australia. Attached to this declaration as Exhibit 1 is a copy of my curriculum vitae.

2) I have been retained in the case of People v. Richter. Counsel for Mr. Richter has provided me with (1) a copy of pages 783 through 786 from the Reporter's Transcript of the trial, a portion of the cross-examination of criminalist Robert Garbutt and (2) page 3 of an April 27, 1995 report prepared by Robert Garbutt. I have also examined a Mac-12 in preparation for rendering an opinion in this case.

3) In both his testimony and report, Mr. Garbutt described his examination of a Mac-12 .380 caliber semiautomatic gun. Mr. Garbutt notes that "the hammer axle is missing a 'circlip' retainer which allows the pin to move from its normal position." Mr. Garbutt also observed grinding and polishing on the bottom aide of the receiver which may reflect an attempt to make the gun full auto. He concluded that the missing circlip retainer could cause the gun to fail to fire properly. In his testimony, Mr. Garbutt stated that he did not know if this alteration could cause the gun to fail to eject a spent cartridge. (RT 785.)

4) Based on my examination of the Mac-12, I believe this alteration can cause the gun to fail to eject a spent cartridge. Normally, after a bullet is fired from a Mac-12, the bolt slides back with the spent cartridge and allows what is known as the ejector to eject the spent casing. In a properly functioning Mac-12, the hammer does not interfere with this action of the bolt.

When the "circlip" or "c-clip" is removed, however, it allows the hammer pivot pin to elide inside the weapon and lose contact with what is known as the mating surface. In turn, this allows the hammer to become dislodged, which jams the bolt before it reaches the point where the ejector contacts the cartridge. This causes a failure to eject a spent cartridge and would prevent the gun from firing again.

5) I would have been available to testify to this if called as a witness at defendant's trial.

I declare under penalty of perjury that the foregoing is true to the beat of my knowledge.

Executed this 13th day of September in Reno, Nevada.

/s/________________
Daniel Joseph

Supplemental
DECLARATION OF BRIAN WRAXALL

I, Brian Wraxall, declare as follows:

1) I am a Forensic Serologist with over thirty years of experience in the study of serology.

2) I am Executive Director and Chief Forensic Serologist at the Serological Research Institute. The curriculum vitae, attached to this declaration, details my education, professional experience publications, presentations, and other relevant information.

3) In July 2000, I was retained in the case of People v. Richter. I have been provided with, and have reviewed, the testimony of criminalist. Jill Spriggs, pages 885-917. Ms. Spriggs tested a blood sample identified as Exhibit 14-A to determine PGM type. She determined that the sample was PGM subtype 2+1+. She tested. a sample of blood from Patrick Klein and determined it to be PGM subtype 1+. Finally, she tested a sample of blood from Joshua Johnson and determined it to be PGM subtype 2+1+.

4) Ms. Spriggs testified that she did not believe the 14-A sample was a commingling Mr. Klein's and Mr. Johnson's blood. Ms. Spriggs reasoned that the banding patterns of the 2+ band and the 1+ band of the 14-A sample were the same intensity. At page 897, she testified that had there been two persons contributing to the 14-A sample, she "would expect this 1+ band to be very, very dark and this 2+ band to be lighter because you got 1+

contributing from Patrick Klein and 1+ contributing from Johnson." Because banding patterns were of the same intensity, she excluded Mr. Klein's a second contributor to the 14-A sample. This theory is scientifically unreliable for two reasons.

5) First, the 2+ band in a 2+1+ blood sample is usually, but not always, equal in intensity to the 1+ band. Thus, if the 2+ band, in Mr. Johnson's blood were of greater intensity than the 1+ band, Mr. Klein's 1+ contribution to Mr. Johnson's blood could have made the 1+ band darker, but its intensity compared to a 2+ band would appear to be of equal intensity (as Ms. Sprigg's found in the 14-A sample)

6) Second, the relative intensity between the 2+ band and l+ band in the 14-A sample would depend on the proportion of Mr. Klein's blood commingled with Mr. Johnson's blood. Depending on the relative proportions the 1+ contribution from Klein's blood would not necessarily make a noticeable difference in the intensity of the 1+ bend in a mixed sample-

7) For these reasons, a finding that the banding patterns of the 2+ band and the 1+ band of the 14-A sample were of equal intensity could not exclude Mr. Klein as a contributor to the 14-A sample.

8) I. would have been available to testify to this if called as a witness at Mr. Richter's trial.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 21st day of July in Richmond, California.

/s/

Brian Wraxall

S082167

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOSHUA RICHTER, On Habeas Corpus

Petition for writ of habeas corpus is DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA RICHTER,	CIV S-01-0643 (JKS)
Petitioner, v.	RESPONDENTS' RESPONSES TO RICHTER'S SPECIAL INTERROGATORIES
RODNEY HICKMAN, et al., Respondents.	

Pursuant to Federal Rules of Civil Procedure, rule 33, and Rule 33-250 of the Local Rules of the Eastern District of California, Deputy Attorney General Harry Joseph Colombo, counsel for Respondents,

hereby answers Petitioner Richter's Special Interrogatories, as follows:
INTERROGATORY No. 1

> Do YOU dispute that Investigator Maloney's testimony at TRIAL with regard to the accessibility of the crawlspace at the FAIR OAKS HOUSE was false? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

Respondents contend that Investigator Maloney's trial testimony in regard to the accessibility of the crawlspace at 4620 Fair Oaks Boulevard in Sacramento, California was truthful. As Mr. Maloney testified at trial, he first went to the house at 4620 Fair Oaks Boulevard in May 1995 to look for possible bullet holes in the walls. (RT at 839-841.) Mr. Maloney located a possible bullet hole in the north wall of the bedroom that Mr. Johnson formerly occupied at the residence. (RT at 841-842.) The hole was ten inches up from the floor and approximately 16-1/2 inches east of the west wall. (RT at 842.) There was a corresponding hole on the exterior of the house. (RT at 843.)

Thereafter, in November 1995, Mr. Maloney again went to the house at 4620 Fair Oaks Boulevard, this time to examine the floor in the bedroom Mr. Johnson formerly occupied for possible bullet holes. (RT at 847-848.) The investigator found a hole in the floor which appeared to be consistent with a .22-caliber bullet. (RT at 848.) Maloney took photographs of the hole in the floor; included in some of the photographs was a ruler next to the hole. (RT at 852-853.) Mr. Maloney said that, after taking pictures of the hole in the floor, he "took a skill saw . . . and cut that little area out which then fell through . . . ." (RT at 849.) Mr. Maloney testified that, underneath the portion of the floor that he had cut out, was a space approximately four feet deep. (RT at 854.) Mr. Maloney testified that he looked for but could not find any access for a crawl space under the floor. Mr. Maloney said, "[T]here's a concrete pad at the bottom, and then the siding comes all the way down to the concrete pad. It goes all the way around the house as far as I knew." *Ibid.*

Insofar as Petitioner's father, Dale Richter, declares that he was able to discover an opening to the crawlspace under the house at 4620 Fair Oaks Boulevard sometime after the rendition of the verdicts by the jury,[1] Respondents submit that Mr. Richter's declaration fails to establish that the house was in the same condition at the time he (Dale Richter) went there as it was when Maloney was there in November 1995. In sum, Respondents submit that Mr. Maloney's testimony was truthful.

INTERROGATORY No. 2

> Do YOU dispute that the PROSECUTION knew that Investigator Maloney's testimony at TRIAL was false? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

Respondents contend that, because Investigator Maloney's trial testimony in regard to the accessibility of the crawlspace at 4620 Fair Oaks

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[1] Respondents observe that the jury returned its verdicts on December 18, 1995 (See CT 28 at 317-325.)

Boulevard in Sacramento, California was truthful, the prosecution had no basis for believing otherwise. As noted in response to Interrogatory No. 1, nothing in Mr. Maloney's testimony was false or misleading. Mr. Maloney testified he went to the house at 4620 Fair Oaks Boulevard in November 1995 specifically to look for a bullet hole in the floor; he found what appeared to him to be a .22-caliber bullet hole under the carpet. (RT at 847-848, 863.) Mr. Maloney took photographs of the hole in the floor; included in some of the photographs was a ruler next to the hole. (RT at 852-853.) Mr. Maloney readily acknowledged that after cutting out the piece of flooring with the apparent bullet hole, it fell down into a four-feet deep space under the floor. Mr. Maloney testified that he looked for, but did not find, any access to a crawl space under the house to retrieve the piece of floorboard. Mr. Maloney said that, so far as he knew, the crawl space was sealed off by siding that extended to the house's concrete foundation. (RT 849, 854.)

Respondents contend there is no basis for Petitioner's insinuation that the prosecutor must have known that Mr. Maloney's testimony in regard to the lack of access to "the crawl space was false. While Mr. Maloney acknowledged that he and the prosecutor had gone together to the house on Fair Oaks Boulevard on November 7, 1995 (RT at 846-847), Maloney testified that they had gone to the house on that date "to look for a hole that was apparently in the kitchen area of the house . . . ." (RT at 847.) Mr. Maloney said he looked at every wall in the house for possible bullet holes; *he did not look for bullet holes in the floor on that occasion*. (RT at 847-848.)

There is nothing in the trial court record to suggest that the prosecutor looked for and found easy access to the crawl space when he visited the house. In point of fact, when the prosecutor went into the house he was clearly interested in bullet holes in the walls-not in the floor. Put simply, the prosecutor would have had no basis for knowing that Mr. Maloney had supposedly lied about the accessibility of the crawl space under the house because he was not present when Maloney tried to collect the piece of floorboard and lost it; consequently, the prosecutor had no duty to correct the testimony of Mr. Maloney because he did not know, nor should he reasonably have known, that Maloney's testimony was false or misleading.

INTERROGATORY No. 3

> Do YOU dispute that the bullet hole found in the floor of the bedroom at the FAIR OAKS HOUSE ,vas caused by the firing of a .380 caliber bullet? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

Respondents contend that the bullet hole in the floor of the bedroom at 4620 Fair Oaks Boulevard was made by a .22-caliber bullet. As noted above, Mr. Maloney testified that he went to the house at 4620 Fair Oaks Boulevard on November 21, 1995 to examine the floor in the bedroom Mr. Johnson formerly occupied for possible bullet holes. (RT at 847-848.) After pulling up the carpet, Mr. Maloney found a hole in the floor which: in his opinion, appeared to be consistent with a .22-caliber bullet. (RT at 848-849, 863.) Mr. Maloney took photographs of the hole in the floor; included in some of the photographs was a ruler next to the hole. (RT at 852-853.) It was not disputed at trial that the photographs were a true and accurate depiction of the hole, including its size.

INTERROGATORY No. 4

> Do YOU dispute that JOHNSON's testimony at TRIAL that the bullet hole in the floorboard of the FAIR OAKS HOUSE was caused when he accidentally fired his .22 caliber rifle while cleaning it was false? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

Respondents contend that Joshua Johnson's trial testimony in regard to how the bullet hole was made in the bedroom floor of the house at 4620 Fair Oaks Boulevard was truthful. Johnson explained how the hole came to be in the bedroom floor as follows: "I was cleaning or going to clean my .22[-caliber rifle], and I thought the chamber was empty because I pulled the bolt back, and I pulled the trigger, and there was a bullet in the chamber, and it went off It was an accident." (RT 23 at 658.) Respondents have no credible basis for disbelieving the veracity of this testimony.

INTERROGATORY No. 5

> State all facts which RELATE to or support YOUR contention in YOUR ANSWER that "the photographs themselves accurately portrayed the composition of the hole in the floor."

In some of the pictures taken by Mr. Maloney of the hole in the bedroom floor, there is a ruler next to the hole. The ruler provides a means for measuring the size and dimensions of the hole. As there is no suggestion in the record that these photographs might have been doctored, Respondents presume that the exhibits were a true and accurate depiction of the area shown therein.

INTERROGATORY No. 6

> Do YOU dispute that the piece of floorboard from the bedroom in the FAIR OAKS HOUSE containing the bullet hole which was lost by Investigator Maloney could have been recovered? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

As phrased, Respondents do not dispute that the piece of floorboard from the bedroom in the FAIR OAKS HOUSE containing the bullet hole which was lost by Investigator Maloney could have been recovered. However, Respondents contend that there is no evidence in the trial court record to suggest that Mr. Maloney was possessed of the necessary skill at excavation to have recovered the lost piece of floorboard.

INTERROGATORY No. 7

> Do YOU contend that RICHTER's counsel at TRIAL had a sound tactical reason for failing to present expert medical, blood spatter and serologic testimony with regard to the pool of blood found at the FAIR OAKS HOUSE? If

> YOUR answer is anything other than an unqualified yes, please state all facts which RELATE to or support YOUR contention.

To reiterate what Respondents have written in their Answer in this matter, Petitioner's trial counsel could have had a sound tactical reason for not presenting expert medical, blood spatter and serologic testimony with regard to the pool of blood found at the house at 4620 Fair Oaks Boulevard

Sacramento Sheriff's Detective Robert Bell testified at trial that he came to the residence at 4620 Fair Oaks Boulevard the early morning of December 20, 1994. (RT at 106-107.) Upon entering the residence, Detective Bell noticed, inter alia, that "there was blood transfer stains [sic] adhering to the edge of the door on the wall near the [front] door, . . ." (RT at 109.) On the couch in the front room "was a concentration of blood . . . near the eastern end of the couch." (RT at 119.) The kitchen "had additional blood drip pattern, transfer pattern, primarily centered around an area of a chair which was .located near the dining room table." (RT at 115-116.) There was a pool of blood just inside the bedroom which appeared to have been disturbed, possibly by a "foot stomp." (RT at 138-141). There was also blood on the wall just above the floor inside the bedroom. (RT at 139,261.)

Detective Bell, who testified as an expert witness in regard to blood spatter evidence (RT at 101-106), opined that the various blood droplets, smears, transfers, and spatter at 4620 Fair Oaks Boulevard were consistent with an injured person moving about in-side the house. (RT at 115-116, 134-137, 206, 225.) Detective Bell further testified that the blood spatter evidence, along with the other evidence in the house such as the spent shell casings, was consistent with Mr. Johnson having been shot while in the bedroom. (RT at 203.)

Detective Bell opined that, based on the blood flow patterns on his face (RT at 156-157), the decedent, Patrick Klein, was "on that couch fully or slightly above the couch at the time he was shot." (RT at 45.) According to Detective Bell, it would be "highly unlikely" that Mr. Klein was shot somewhere other than on or very near the couch and then moved onto the couch. (RT at 15].) Detective Bell asserted that, if Mr. Klein had been shot near the door of the bedroom and had fallen straight down, Klein "would have had to have been lifted straight up because we have no transfer of blood." (RT at 155.)

Confronted with the testimony of Detective Bell, a well-respected and competent blood spatter expert who had personally been present at the crime scene to observe the blood pool, Petitioner's trial counsel could well have determined that it would be fruitless to proffer the testimony of other forensic experts who would offer opinions based only on the reports of crime scene investigators and photographs of the condition of the house.

INTERROGATORY No. 8

> Do YOU dispute that RICHTER's counsel's failure to present expert medical, blood spatter, serologic, and ballistics testimony with regard to the pool of blood found at the FAIR OAKS HOUSE was objectively unreasonable? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

Respondents submit that Petitioner's trial counsel's failure to present expert medical, blood spatter, serologic, and ballistics testimony with regard to the pool of blood found at 4620 Fair Oaks Boulevard was not objectively unreasonable. No evidence has been adduced to date to suggest that reasonably competent counsel, confronted with the evidence presented by the prosecution at Petitioner's trial, would have responded differently-much less more adroitly.

As the Ninth U.S. Circuit Court of Appeals has held, "'An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.'" *Frazer v. United States*, 18 F.3d 778, 782 (9th Cir. 1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Thus, to prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show (1) his attorney's performance was unreasonable under prevailing professional standards; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the results would have been different. *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting *Strickland*, 466 U.S. at 687).

To the extent that Petitioner asserts that the failure of his trial counsel, Mark Axup, to present expert medical, blood spatter, serologic, and ballistics testimony, with regard to the pool of blood found at 4620 Fair Oaks Boulevard was objectively unreasonable, the record refutes this assertion. As noted ante, Detective Bell opined that the blood spatter evidence, along with the other evidence in the house such as the spent shell casings, was consistent with Mr. Johnson having been shot while in the bedroom.

Detective Bell observed that the pool of blood appeared to have been disturbed, possibly by a "foot stomp." According to Detective Bell, based on the blood flow patterns on his face, Mr. Klein was "on that couch fully or slightly above the couch at the time he was shot." Detective Bell testified that it would be "highly unlikely" that Mr. Klein was shot somewhere other than on or very near the couch and then moved onto the couch. Detective Bell asserted that, if Mr. Klein had been shot near the door of the bedroom and had fallen straight down, Klein "would have had to have been lifted straight up because we have no transfer of blood."

The declarations of Dr. Paul Herrmann and Ken Moses, who profess to having been available to give expert testimony that would have differed with Detective Bell's opinions in regard to how the blood pool was made and by whom, do not establish that Mr. Axup performed incompetently by not calling these two witnesses at Petitioner's trial. First, these witnesses do not proffer any opinions on the issue of how Mr. Johnson, injured and suffering from two gunshot wounds at the time, could have lifted Mr. Klein up from the floor and moved him to the couch without leaving a discernible trail of blood in the process. The undisputed evidence at trial disclosed that, at the time of his death, Mr. Klein was six feet one-half inch tall and weighed 166 pounds.

There is nothing in the declarants' averments to suggest that they would have opined that Mr. Johnson, suffering from two gunshot wounds, was suddenly possessed of Herculean strength. Thus, the testimony of Dr. Herrmann and Mr. Moses could not have benefitted Petitioner and trial counsel was not incompetent for not presenting the testimony of these two witnesses.

Moreover, trial counsel was not incompetent as a result of his failure to call Dr. Herrmann and Mr. Moses to counter the prosecutor's argument that Mr. Johnson's cheek and shoulder wounds were the source of the blood pool. Respondents submit that the opinions of Dr. Herrmann and Mr. Moses in this regard are highly debatable at best.

Dr. Herrmann asserts that (1) the amount of blood likely to result from a shoulder injury such as that suffered by Mr. Johnson "would be minimal," (2) had Mr. Johnson's injuries been sufficient to cause the blood pool, "it is unlikely that [Deputy] Wright would have been oblivious to the injury," (3) Deputy Wright "did not notice that Mr. Johnson was injured until a conversation that took place several minutes after first contacting Mr. Johnson," and (4) Mr. Johnson's testimony suggests he was never standing in the doorway long enough to create the pool of blood that was deposited.

Respondents submit that Dr. Herrmann's opinions in regard to the blood pool are dubious; he does not acknowledge the uncontested evidence presented at trial that, when the Sheriff's deputies arrived at the residence at 4620 Fair Oaks Boulevard, Mr. Johnson had blood on his cheeks, his shirt, his hands, and his right shoulder. After he had checked the house, Deputy Wright took Mr. Johnson into the kitchen and began talking to him. While he was talking to Deputy Wright, Mr. Johnson began spitting up blood. When Mr. Johnson wiped off his face with a towel, Deputy Wright could then see that Mr. Johnson had a hole in his cheek. Later, Deputy

Wright observed that Mr. Johnson had a gunshot wound in' his shoulder as well.

There is nothing in the state court trial record that suggests that Mr. Johnson's injuries were merely superficial or insubstantial. Contrary to Dr. Herrmann's suggestion, the record does not reflect that Deputy Wright was oblivious to Mr. Johnson's injuries. Rather, the record discloses that Deputy Wright did not see exactly what injuries Mr. Johnson had sustained until after they had started talking in the kitchen and the blood had been wiped away from Johnson's face.

Similarly, Mr. Moses's opinion that the blood pool must have come from "a source close to or lying on the floor." is not, Respondents submit, inconsistent with the prosecution's theory that the blood pool was made by Mr. Johnson bleeding after he was shot. While Mr. Johnson testified that he was shot in bed and did not arise from the bed until after Petitioner and codefendant Branscombe had left from his residence, his recall of what transpired the early morning of December 20, 1994, was not always perfectly consistent with the testimony of other witnesses.[2] Thus, Mr. Johnson's testimony that he stayed in his bed after he was shot until Petitioner and codefendant Branscombe had departed, cannot be taken as the gospel. Respondents submit that it is inferable from the evidence that Mr. Johnson fell, not onto his bed after he was shot but, instead, onto the floor. This would also explain the lack of a blood trail connecting Mr. Klein to the blood pool.

---

[2] For example, Mr Johnson testified that Melvin Sargent came to the house at 4620 Fair Oaks Boulevard and stayed for only 20 or 30 minutes (RT at 50]) whereas Melvin said he got to Johnson's house around one o'clock in the morning and stayed

until 2:30 a.m. (RT at 340.) And, while Melvin claimed he bought half an ounce of marijuana from Mr. Johnson for $200 that night (RT at 345-346), Mr. Johnson thought Melvin got an ounce of marijuana on that occasion (RT at 28 502.)

In sum, trial counsel's failure to present expert medical, blood spatter, serologic, and ballistics testimony with regard to the pool of blood found at 4620 Fair Oaks Boulevard at trial does not fall outside the wide range of reasonable professional assistance.

INTERROGATORY No. 9

> Do YOU dispute that, given the wounds JOHNSON received, if the blood pool found at the FAIR OAKS HOUSE had been caused by dripping from these wounds, the dripping would have caused a large number of round, splash drops (known as "satellite drops") surrounding the main pool of blood found on the floor of the FAIR OAKS house? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

Respondents contend that, depending on what position Johnson occupied at the time he bled on the floor of the house, his wounds may or may not have caused a large number of round, splash drops (known as "satellite drops") surrounding the main pool of blood. The evidence of record discloses that no "satellite drops" were observed by the crime scene investigators; in particular, Detective Bell did not observe that there was evidence of such a splattering of blood. Bell said there was a pool of blood just inside the bedroom which appeared to have been disturbed, possibly by a "foot stomp:" (RT at 138-141.) The detective's observation was perfectly consistent with the testimony of Mr. Johnson, who claimed that the impact of the shot had "knocked [him] down." (RT at 510.) Johnson was subsequently observed to have gunshot wounds to his cheek and shoulder. (RT at 38.)

Respondents dispute Petitioner's suggestion that, if Johnson were the source of the blood pool, he must have been standing while he bled.

INTERROGATORY No. 10

> Do YOU contend that JOHNSON testified truthfully at TRIAL that he was shot in bed and did not arise from his bed until RICHTER and BRANSCOMBE had left his residence? If YOUR answer is anything other than an unqualified yes, please state all facts which RELATE to or support YOUR contention.

Respondents contend that the record supports Mr. Johnson's claim at trial that he was "knocked down" when he was shot by Petitioner and co-defendant Branscombe. (See RT at 5]0.) It may be inferred that Johnson fell back onto his bed and stayed there until Petitioner and codefendant Branscombe had left; however, it is unclear from the record whether Johnson was on the floor or on the bed after being shot. In any event, Respondents submit that Johnson's testimony was truthful.

INTERROGATORY No. 11

> Do YOU contend that JOHNSON fell on to the floor when he was shot, not on to his bed?-If YOUR-answer is anything other than an unqualified yes, please state all facts which RELATE to or support YOUR contention.

Respondents contend that the record supports Mr. Johnson's claim at trial that he was "knocked down" when he was shot by Petitioner and codefendant Branscombe. (See RT at 510.) It may be inferred that Johnson fell onto the floor rather than onto his bed; however, it is unclear from the record whether Johnson was on the floor or on the bed after being shot. In any event, Respondents submit that Johnson's testimony was truthful.

INTERROGATORY No. 12

> Do YOU contend that RICHTER's counsel at TRIAL had a sound tactical reason for failing to present expert testimony that the altered Mac-12 gun had a tendency to jam? If YOUR answer is anything other than an unqualified yes, please state all facts which RELATE to or support YOUR contention.

Respondents contend that Petitioner's trial counsel could well have had a sound tactical reason for not presenting expert testimony that the altered Mac-12 gun had a tendency to jam. Here, the prosecution's expert witness on firearms and ballistics, Robert Garbutt, had examined the Mac-12 pistol that Petitioner's trial counsel had turned over to police investigators .(RT at 783-786) and noted that the firearm was missing the Circlip retainer for the firing pin. (RT at 784.) Mr. Garbutt opined that there was a possibility that, due to the removal of the Circlip, the Mac-12 might malfunction. (RT at 785.) Mr. Garbutt said he did not know if the lack of the Circlip retainer might cause the weapon not to eject an expended cartridge casing. *Id.*

Thus, there was evidence of record that the firearm at issue was possibly susceptible to jamming when being fired. This was enough, Respondents submit, to support an argument that the gun did, in fact, jam on the night of the shooting. Any additional expert opinion testimony on this point would have been merely redundant.

Moreover, the evidence at trial disclosed that the Mac-12 at issue was identified as the weapon that had fired an expended shell casing that was found in the cab of Petitioner's truck after his arrest. (RT at 377, 385-388, 773-774.) While an inference could be drawn from this evidence that the weapon jammed when Mr. Johnson fired it, and the cartridge subsequently became dislodged in Petitioner's vehicle, Respondents contend there is an equally compelling inference that could be drawn as well, that is, after the gun had been stolen from Mr. Johnson, Petitioner and/or Branscombe discharged the weapon in order to determine if it was operable. The expended shell casing thus fell into the cab of Petitioner's truck, not because it was jammed in the gun when it was taken but because the gun was fired from inside the truck.

Put simply, Petitioner's trial counsel could have had a sound tactical reason for not presenting expert testimony that the altered Mac-12 gun had a tendency to jam.

INTERROGATORY No. 13

> Do YOU dispute that RICHTER's counsel's failure to present expert testimony with regard to the possibility that the altered Mac-12 jammed after JOHNSON fired the Mac-12 gun at Branscombe was objectively unreasonable? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

Respondents contend that Petitioner's trial counsel's decision not to present expert testimony with regard to the possibility that the altered Mac-12 had jammed after Johnson had fired the Mac-12 gun at Branscombe was not objectively unreasonable. As discussed above in regard to Interrogatory No. 12, the testimony of the prosecution's ballistics expert, Mr. Garbutt, provided an evidentiary basis for Petitioner's counsel to argue that the Mac-12 had jammed after Johnson had initiated gunfire. The presentation of additional expert testimony to buttress such an argument would have been, Respondents submit, cumulative and not particularly persuasive.

INTERROGATORY No. 14

> Do YOU dispute that the Mac-12 identified at trial by JOHNSON was JOHNSON's weapon? If YOUR answer is anything other than an unqualified no, please state all facts which RELATE to or support YOUR contention.

Respondents do not dispute that the Mac-12 identified at trial by Mr. Johnson as his weapon was, in fact, his firearm. (See RT at 521-522.)

INTERROGATORY No. 15

> Do YOU contend that Stephanie Edwards was a credible witness at TRIAL? If YOUR answer is anything other than an unqualified yes, please state all facts which RELATE to or support YOUR contention.

Respondents contend that certain portions of Edwards's testimony were undoubtedly truthful and therefore she was believable as to those matters. However, Respondents contend that other parts of her testimony were not credible. For example, Respondents have no reason to doubt Edwards's claims that she had been Petitioner's girlfriend and, as of December 1994, sometimes stayed at the house 2405 Gunn Road (where Petitioner also resided). (RT at 1015-1017.) On the other hand, Respondents question the veracity of Edwards's claim that Mr. Johnson's gun safe was in the bedroom portion of the garage at 2405 Gunn Road as of Sunday, December 18, 1994 (the day before the crimes at issue were committed). (R T at 1019, 1022-1 023.)

INTERROGATORY No. 16

> Do YOU contend that RICHTER's counsel at TRIAL had a sound tactical reason for failing to present expert serologist testimony? If YOUR answer is anything other than an unqualified yes, please state all facts which RELATE to or support YOUR contention.

Respondents contend that Petitioner's trial counsel may well have had a sound tactical reason for failing to present expert serologist testimony.

Initially, Respondents observe that no declaration, attestation, affidavit or other averment has been proffered in connection with these proceedings from a qualified serologist suggesting that such a witness would have been available to testify on behalf of Petitioner at his state jury trial. Moreover, even if such a witness were available, there is nothing in the record of the trial court proceedings or the proceedings presently pending before the United States District Court which discloses what evidence a serologist might be expected to present at a trial on charges of murder. Absent some basis for evaluating what contribution a serologist might make in a case such as this, Respondents contend Petitioner's trial counsel had no reason to present expert serological testimony.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of April, 2004, at Sacramento, California.

Dated: April 16, 2004

Respectfully submitted,
BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JOHN G. McLEAN
Supervising Deputy Attorney General
/s/
HARRY JOSEPH COLOMBO
Deputy Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Richter v. Hickman, et al.*** No.: CIV S 01 0643 (JKS)
Branscombe v. Roe No.: CIV S 01 0963 (JKS)

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am] 8 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 19, 2004, I served the attached RESPONDENTS' RESPONSES TO RICHTER'S SPECIAL INTERROGATORIES by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 19, 2004, at Sacramento, California.

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Declarant

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Attorney General of the State of California
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA RICHTER, Petitioner, v. RODNEY HICKMAN, et al., Respondents.	CIV S-01-0643 (JKS) RESPONDENTS' PRELIMINARY STATEMENT OF ISSUES

Pursuant to this Court's order filed on November 17, 2003, Respondents hereby submit this preliminary statement of issues:

1. In regard to the bullet hole in the bedroom of the house at 4620 Fair Oaks Boulevard in

Sacramento County (the crime scene), did Petitioner's trial counsel provide constitutionally deficient representation by not challenging the prosecution's proof that the hole was made by a .22-caliber bullet? More particularly,

A. When did Petitioner's trial counsel become aware of the existence of a bullet hole in the bedroom of the house at 4620 Fair Oaks Boulevard in Sacramento County?

B. Who informed Petitioner's trial counsel of the existence of a bullet hole in the bedroom of the house at 4620 Fair Oaks Boulevard?

C. What efforts did Petitioner's trial counsel undertake to ascertain the size of the bullet hole in the bedroom of the house at 4620 Fair Oaks Boulevard?

D. Was Petitioner's trial counsel surprised by the testimony of District Attorney Investigator Brian Maloney in regard to the size of the bullet hole in the bedroom of the house at 4620 Fair Oaks Boulevard?

    1) If yes, did Petitioner's trial counsel consider seeking a continuance to prepare a response to Maloney's testimony? If not, why not?

2) If no, did Petitioner's trial counsel consider this testimony especially damaging?

2. Did Petitioner's trial counsel provide constitutionally deficient representation in regard to the bloodstain evidence presented by the prosecution? More particularly,

A. Did Petitioner's trial counsel unreasonably fail to consult with and present the testimony of expert witnesses who could have refuted the prosecution's theory that the large pool of blood near the bedroom was made by someone other than the surviving victim, Joshua Gunner Johnson?

1) Specifically, was Petitioner's trial counsel aware that Paul Herrmann, M.D., a forensic pathologist, and Ken Moses, a forensic criminologist, were available and would have testified that the prosecution's theory, i.e., that the pool of blood deposited in the doorway between the bedroom and living room came from Mr. Johnson's wounds, was "scientifically unreliable"?

2) Had Petitioner's trial counsel been aware that Dr. Herrmann and Mr. Moses were available and would have testified that the

prosecution's theory, i.e., that the pool of blood deposited in the doorway between the bedroom and living room came from Mr. Johnson's wounds, was "scientifically unreliable," would counsel have presented this evidence in Petitioner's defense?

a) If not, why not?

B. Did Petitioner's trial counsel unreasonably fail to consult with and present the testimony of expert witnesses who could have refuted the prosecution's evidence that a sample of blood taken from the east wall of the bedroom just above the floor could not have come from the murder victim, Patrick Klein?

1) Specifically, was Petitioner's trial counsel aware that Dr. John Thornton, a criminalist, was available and would have testified that, in order for the prosecution's criminalist's conclusion that Mr. Klein did not contribute to the blood spatter sample "to be valid under any and all circumstances, the possibility of a mixture of stains would have to be discounted"?

2) Had Petitioner's trial counsel been aware that Dr. Thornton

would have testified as set forth above, would counsel have presented this evidence in Petitioner's defense?

3. Did Petitioner's trial counsel render ineffective assistance in regard to the issue of whether or not Mr. Johnson's Mac-12 had jammed the morning of December 20, 1994? Specifically,

   A) Did Petitioner's trial counsel unreasonably fail to consult with and present the testimony of Daniel Joseph, a firearms and ballistics expert, who has asserted, "Based on my examination of the Mac-12, I believe this alteration can cause the gun to fail to eject a spent cartridge"?

   B) Had Petitioner's trial counsel been aware that Mr. Joseph would have testified as set forth above, would counsel have presented this evidence in Petitioner's defense?

4. Was Petitioner's trial counsel's representation of Petitioner ineffective because counsel did not present the testimony of Madalyn Edwards, Shane Westburg, and Linda Stewart? Specifically,

   A) Was counsel aware that these witnesses were available and would have testified that the gun safe found by police investigators at Petitioner's residence had been there for several weeks prior to the crimes and could not have been moved into the house the morning of December 20, 1994, without causing Westburg's and Stewart's dogs to bark?

B) Had Petitioner's trial counsel been aware that Edwards, Westburg and Stewart would have testified as set forth above, would counsel have presented this evidence in Petitioner's defense?

5. Did Petitioner's trial counsel render ineffective assistance as a result of promising to present certain evidence in his opening statement that he did not subsequently seek to introduce in defense of the charges against Petitioner?

A) Had Petitioner's trial counsel been aware of the availability of the evidence presented in support of the instant habeas petition, would he have changed the content of his opening statement to include this evidence? If not, why not?

Dated: January 9, 2004

Respectfully submitted,
BILL LOCKYER
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Richter v. Hickman, et al.*** No.: CIV S 01 0643 (JKS)

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am] 8 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 9, 2004, I served the attached RESPONDENTS' PRELIMINARY STATEMENT OF ISSUES by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

Cliff Gardner
1738 Union Street
San Francisco, CA 94123 - representing
Petitioner Joshua Richter

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 19, 2004, at Sacramento, California.

____

Signature

PETITIONER'S BRIEF

No. 09-587

me Court, U.S.

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B30472

In The
Supreme Court of the United States

◆

KELLY HARRINGTON, WARDEN,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

◆

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

◆

PETITIONER'S BRIEF ON THE MERITS

◆

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QUESTIONS PRESENTED

1. In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. section 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

2. Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984)?

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OPINIONS BELOW

The en banc opinion of the Ninth Circuit Court of Appeals, granting habeas corpus relief, is reported as *Richter* v. *Hickman*, 578 F.3d 944 (9th Cir. 2009) (en banc). The earlier panel opinion, denying relief, was reported as *Richter* v. *Hickman*, 521 F.3d 1222 (9th Cir. 2008). The opinion of the district court, also denying relief, is unpublished. The order of the California Supreme Court, denying habeas corpus, is unpublished. The opinion of the California Court of Appeal, affirming respondent's criminal conviction, is unpublished. Each is reproduced in the Appendix to the Petition for Writ of Certiorari. App. 1a-196a.

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JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on August 10, 2009. The petition for writ of certiorari was filed on November 9, 2009, and was granted on February 22, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

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STATEMENT OF THE CASE

Summary

Respondent Joshua Richter and Christian Branscombe were convicted of murder, attempted murder, burglary, and robbery. At trial, the prosecution's evidence showed that, in stealing a gun safe from a house, Richter and Branscombe shot and injured Joshua Johnson in his bedroom—and that they shot and killed Patrick Klein as he lay sleeping on a couch in the living room. Klein was shot with two different semi-automatic firearms: a .32-caliber, and a .22-caliber. An expended .22-caliber casing found in the living room matched .22-caliber bullets and a magazine for a semiautomatic pistol found in Richter's bedroom. Thus, the prosecutor argued that Richter had shot Klein with a .22-caliber gun while Branscombe had shot Klein with a .32-caliber gun.

Richter testified that he and Branscombe had gone to the residence around 4 a.m., for innocent reasons, and that Branscombe entered while Richter waited in his truck. Upon hearing gunshots, Richter said, he rushed into the house. There, he saw Johnson unconscious on the bed, Klein lying in a pool of blood on the floor by the bedroom door, and Branscombe holding a gun and screaming that "they tried to kill" him. In closing argument, Richter's counsel theorized—despite the matching ammunition found in Richter's bedroom and despite Richter's acknowledgement to the police that he and Branscombe had disposed of two firearms in a marsh after the crimes—that Johnson had shot at Branscombe but hit Klein instead and that Branscombe, firing back in self-defense, had hit both Johnson and Klein.

In later habeas corpus petitions, Richter alleged that his lawyer had rendered ineffective assistance in refraining from investigating and producing expert-opinion testimony that a pool of blood by the bedroom door—photographed but never tested by anyone—might have contained Klein's blood. In Richter's view, such evidence would have corroborated his testimony that he had seen Klein lying there rather than on the couch—so that it would become less likely that Klein had been shot in cold blood while sleeping on the couch and more likely that he had been shot in a "crossfire" as Branscombe supposedly had described it to Richter at the scene. The California Supreme Court, the federal district court, and a panel of the Ninth Circuit Court of Appeals all rejected Richter's ineffective-counsel claim.

However, the Ninth Circuit sitting en banc granted Richter habeas corpus relief. Even though defense counsel had cross-examined the prosecution's blood experts at trial to good effect, the Ninth Circuit held that counsel had acted incompetently in declining to investigate and present expert testimony on the source of the pool of blood. Further—even though none of Richter's proffered experts in the state or federal proceedings ever tested the blood or averred that Klein's blood in fact was present in the pool, and even though photographs showed high-velocity blood spattering on the wall by the couch where Klein lay—the Ninth Circuit also held that counsel's performance had prejudiced the defense. Finally, in a one-sentence statement, the en banc court's opinion characterized the California Supreme Court's rejection of Richter's ineffective-counsel claim as an "objectively unreasonable" application of *Strickland* v. *Washington*, 466 U.S. 668 (1984), so as to permit relief under 28 U.S.C. § 2254.

The Crime and the Investigation

On December 19, 1994, Richter and Branscombe visited Johnson, a marijuana dealer, at his Sacramento home. State Trial Reporter's Transcript (RT) 493. Klein was also there. *Id.* During the visit, Branscombe sat cleaning a .32-caliber handgun. RT 347, 494.

After Richter and Branscombe left, Klein went to sleep on the couch in the living room. Johnson fell asleep in his bedroom. RT 504. Sometime afterwards, Johnson awoke to see Richter and Branscombe in his bedroom taking a gun safe from the closet. RT 507. Branscombe shot Johnson with the .32-caliber pistol, knocking him down. RT 507, 602. A moment later, Johnson heard another gunshot and the sound of voices outside the house. RT 510. Entering the living room, Johnson saw Klein bleeding on the couch. RT 513-14. Richter and Branscombe were gone. RT 632-33.

Johnson's own pistol and his hip sack containing $6,000 were missing. RT 510-13, 538, 583-84. Johnson called the police, and then hid evidence of his own drug dealing. RT 82-83, 514-15 Two sheriff's deputies arrived and saw that Johnson was covered with blood on his cheeks, shirt, hands, and shoulder. RT 25, 27, 32, 39. They also saw Klein, lying on the couch but not breathing, with blood on his face and shoulder from his gunshot wounds. RT 33-34, 42, 53, 144. Near the couch, investigators found a .22-caliber casing and an .32-caliber casing. RT 117, 121, 127-29, 172-73, 253-57, 768-69.

A pool of blood, on the floor just inside Johnson's bedroom, appeared to have been disturbed, possibly by a "foot stomp." There also was blood on the wall inside the bedroom, just above the floor molding. RT 138-41, 261. Investigators obtained a sample of blood from the wall. But no samples ever were collected from the pool of blood on the floor. RT 261, 937-38.

The day after the shootings, sheriff's deputies found Johnson's backpack and gun safe—bearing Richter's fingerprints—in Richter's house. RT 422-23, 446-47, 518-19, 717-20. Investigators also found live .22-caliber cartridges loaded in a magazine of a type usable with a semiautomatic handgun. RT 424-33, 760-65. These cartridges were the same brand and caliber as the .22-caliber casing found near the couch in Johnson's front room. RT 117-21, 254, 256, 768-69.

Richter and Branscombe were arrested and questioned separately. State Clerk's Transcript (CT) 184-85. Richter claimed that his truck had not been at the crime scene and that he was being "set up." RT 1336-37. During a break, the police recorded a conversation in which Branscombe asked Richter what he had told the police. Richter replied that he had told the police he did not kill anyone and "da, da, da." RT 1136. Branscombe responded that he thought "we were going to tell the truth." *Id.* In addition, Richter's girlfriend told the police that she had talked to Richter after the shootings, but said she did not believe it would be helpful to Richter to reveal their conversation. RT 1006.

The State Court Jury Trial

Richter and Branscombe were charged with murder, attempted murder, burglary, and robbery. CT 16-19. At their joint trial, the prosecution produced testimony from Johnson and from the police investigators. RT 25-265, 419-714, 790-808.

In addition, the prosecution—which had never sought to analyze any blood from the crime scene until after the trial had begun—produced expert testimony from two witnesses. Jill Spriggs, a county criminalist who analyzed a blood sample taken from the bedroom wall, opined that it could have been Johnson's but could not have been Klein's. RT 261, 888, 937, 892. Detective Robert Bell, a blood-spatter expert, testified that the various blood droplets, smears, transfers, and spatter in Johnson's home were all consistent with an injured person moving about inside the house. RT 115-16, 134-37, 206, 225. Bell further testified, based on the blood flow patterns on Klein's face, that Klein had been "on that couch fully or slightly above the couch at the time he was shot." RT 145. Bell opined that it was "highly unlikely" that Klein could have been shot somewhere else in the house and then moved to the couch. RT 151. He explained that, if Klein had been shot near the bedroom door and fallen straight down, Klein "would have had to have been lifted straight up because we have no transfer of blood." RT 155.

On cross-examination by Richter's counsel, Spriggs admitted that she had not performed any testing to determine if there were any cross-contamination (i.e., a mixture of more than one person's blood) in the blood sample. RT 896. And, in response to questioning by Richter's counsel, Bell admitted that he could not tell by looking at the blood on Klein's face in what position Klein had been when he was shot. RT 160. Bell also acknowledged that, because of the absence of a bullet hole in the armrest of the couch, it was unlikely that Klein had been lying down on the couch when he was shot. RT 162. Finally, Richter's counsel got Bell to admit that he could not "use the blood evidence to establish where" in relation to the couch Klein had been positioned when he suffered his neck wound. RT 230.

Testifying in his own defense, Richter asserted that he and Branscombe had gone to the house around 4 a.m. to return a .32-caliber hand gun belonging to Johnson. RT 1085, 1233. Richter claimed that Klein had let Branscombe in while Richter waited outside. RT 1087. Then, Richter testified, he heard "a series of gunshots." *Id.* Entering the house, he saw Klein lying in the bedroom doorway; and, entering the bedroom, he saw Johnson contorted on the bed. RT 1089-90. Branscombe, holding a gun, told Richter, "They fired. They shot at me, . . . they tried to kill me." RT 1090-91. Next, according to Richter's testimony, Branscombe picked up another one of

Johnson's guns, a .380-caliber Mac-12, and ran out of the house. RT 1091-92. Richter and Branscombe drove to Richter's girlfriend's apartment and then to a marsh where they threw away the Mac-12 and the .32. RT 1092-95, 1102, 1119, 1145.

Richter's counsel also called Richter's current and former girlfriends. They testified that Johnson's gun safe was already in Richter's bedroom before the incident. Richter's then-girlfriend asserted that the incident had to have occurred at around 4:20 a.m., which was inconsistent with Johnson's testimony that the incident had to have occurred at around 5:00 a.m. RT 979, 1015-23.

The jury found Richter and Branscombe guilty as charged. CT 317-25. The court sentenced them to prison for life without parole. CT 389, 392-93.

State Post-Trial Proceedings

In 1998, the California Court of Appeal affirmed the judgment. App. 1a-21a. The California Supreme Court denied further direct review. SER[1] 29.

In 1999, Richter filed a petition for writ of habeas corpus in the California Supreme Court. JA 7-87. He alleged that his lawyer had rendered ineffective assistance under *Strickland* v. *Washington* by not presenting, among other things, "readily available expert testimony" about the blood spatter and the pool of blood in the bedroom doorway that supposedly would have corroborated Richter's trial testimony that he saw Klein's body there. *Id.*, 15-22, 57-60, 72-74, 78-81. In support, Richter presented declarations from four "experts," who claimed that they could have offered evidence (1) to refute the prosecutor's theory that the large pool of blood near the bedroom was made by Johnson and (2) to show that Klein was a possible contributor to the blood spatter sample. JA 111-18, 126-28.

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[1] SER refers to the Supplemental Excerpts of Record submitted to the Court of Appeals by the Warden.

Under California law, a habeas corpus court initially determines whether a petition for writ of habeas corpus states facts that, if true, would entitle the petitioner to relief. If no such prima facie case is stated, the court summarily denies the petition on the merits. See *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 391 (Cal. 1994); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc) (unexplained "postcard" denial from the California Supreme Court is a decision on the merits). In 2001, the California Supreme Court summarily denied Richter's petition on the merits. JA 129.

Federal Habeas Corpus Proceedings

In April 2001, Richter filed a petition for writ of habeas corpus in the United States District Court. JA 1. Again he claimed that his trial counsel had rendered unconstitutionally ineffective assistance in declining to investigate and produce expert opinion evidence on the blood pool and blood spatter.

At the district court's direction, Richter's trial counsel gave a deposition. JA 1-2. In it, he explained that his initial strategy was to exploit the State's failure to analyze the blood evidence or to designate any experts to testify about the blood. ER[2] 367-80. Accordingly, Richter's counsel concentrated on demonstrating the unreliability of Johnson as a witness and the superficial investigation conducted by the police. ER 269-70, 367.

The district court denied the petition. App. 23a-57a. The court noted that the deferential review standard of 28 U.S.C. § 2254(d)(1) applied to the claim. But its explicit conclusions focused directly on counsel's performance. The district court found that Richter's counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." App. 39a. This determination was reasonable, the court held, because the prosecution had "not prepar[ed] a blood spatter analysis or even test[ed] any of the blood samples taken from the crime scene." *Id.* Moreover, upon being presented with the serologist's report and being informed that the prosecution intended to use Bell as a blood spatter expert, Richter's counsel objected to these witnesses being called to testify—but to no avail.

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[2] ER refers to the Excerpts of Record submitted to the Court of Appeals by Richter.

Under the circumstances, the district court found, counsel's "actions were reasonable." App. 40a.

A three-judge panel of the Ninth Circuit affirmed. See *Richter* v. *Hickman*, 521 F.3d 1222. App. 58a-85a. The panel acknowledged that, under § 2254(d)(1), it could not grant Richter's application for habeas relief unless the state court had rendered a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. App. 64a. The panel held that, even if Richter's counsel's "failure to consult and present [scientific] experts was unreasonable," Richter was not prejudiced. App. 66a. The panel wrote:

> There is no reasonable probability that the jury would have rendered a different verdict had [Richter's] proffered serology experts testified at trial. The serology experts' testimony, even if believed, would not significantly weaken the State's case. All the testimony says is that it is possible that the blood sample taken from the bedroom doorway might be a mixture of Klein and Johnson's blood, instead of being exclusively Johnson's blood. Because these expert reports do not foreclose the likelihood that the blood from the blood sample came exclusively from Johnson, they do not impeach Johnson's testimony that the blood came from him alone. The expert reports also do nothing to contradict the weight of the evidence presented at trial that supported the State's theory of the case.

App. 70a. The panel also rejected Richter's pathologist's claim that the prosecutor's theory of how the blood pool was formed (that it came from Johnson while he awaited the sheriff's deputies) was "scientifically un-reliable." The panel explained: "The reasons the expert provided in reaching his conclusion [i.e., Johnson's wounds were not serious enough to have bled profusely while he stood in one place] are flawed and are partially contradicted by the record." App. 71a.

On rehearing en banc, the Ninth Circuit by a 7-4 vote granted Richter habeas corpus relief. App. 86a-196a. Invoking Sun Tzu's martial philosophy, the rule of always being prepared for "any contingency," the majority found counsel's performance to be deficient. *Id.* at 87a. Claiming that the source of the blood in the hallway by the bedroom door was "the single most critical issue in the case, at least from the standpoint of the defense," App. 103a, the majority faulted Richter's counsel for not consulting forensic experts at three stages: first, before choosing a defense; second, while preparing a defense; and, third, in the middle of trial when the prosecution suddenly produced two expert witnesses of its own. According to the majority, defense counsel should have anticipated that the prosecution would call a blood-spatter expert. App. 103a-107a. The majority acknowledged that counsel reasonably had decided not to have any of the blood tested before trial because it would have risked harm to the defense, App. 109a-110a (n. 9); but it nonetheless criticized him because there still was "no negative consequence" to consulting a serology expert before trial. *Id.* The majority denigrated cross-examination as rarely an adequate substitute for affirmative defense testimony. App. 118a-119a (n. 14).

The en banc majority concluded that, while counsel's decision not to call a serology expert alone was not "prejudicial," the failure to call a blood-spatter specialist resulted in prejudice to the defense. App. 125a-132a. The majority stated: "The introduction of forensic evidence that had the effect of showing that Johnson's version of the events was false, and that was consistent with Richter's explanation, would . . . have been invaluable to the defense." *Id.* at 125a. It further asserted: "[T]he spatter evidence presented by Richter's habeas counsel would have conclusively refuted the prosecution's explanation" of how the blood pool had formed. *Id.* at 126a. And it concluded that "impeaching [Johnson's] credibility on a central point through forensic evidence would have likely precluded the jury from returning a verdict of guilty." *Id.* at 127a.

After devoting over 30 pages of its printed opinion to its belief that counsel had rendered ineffective assistance, the majority then asserted, in a bare one-sentence statement, that the California Supreme Court's adjudication of Richter's ineffective-counsel claim had been "objectively unreasonable" so as to permit relief under § 2254(d). App. 135a-136a.

Four judges, in dissent, concluded that defense counsel acted reasonably and that the state court's decision was objectively reasonable so as to bar relief under § 2254(d). In the dissent's view, the majority had failed to take *Strickland* and AEDPA "to heart." App. 157a. Instead, the majority created a novel rule requiring defense counsel to always be prepared for any contingency and thus seek expert advice on every potential evidentiary issue. Viewing the case from the perspective of counsel at the time, the dissent noted that the available evidence of Richter's guilt had made it highly unlikely that forensic investigation would produce helpful evidence. Nor was there any showing that the "modest" difference between the actual cross-examination and the omitted expert testimony would have made a difference in this case. Counsel's decision to refrain from producing expert testimony—such as Richter's proffer about hypothetical possibilities that did not actually eliminate Johnson as the source of the blood in the hallway—did not undermine confidence in the verdict in light of the strong evidence of Richter's guilt. App. 159a-195a.

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SUMMARY OF ARGUMENT

In erroneously granting respondent Richter habeas corpus relief on his ineffective-counsel claim, the Ninth Circuit impermissibly changed the legal standard for assessing the competence of counsel, exaggerated the importance whether the murder victim's blood also might have been present near a bedroom door away from where his body was found, and grossly overstated the potential effect of the speculative and inconclusive expert opinions Richter proffered to the habeas corpus courts while minimizing the good results of defense counsel's cross-examination of the prosecution's experts. Regardless whether the Ninth Circuit might have been authorized to act on such views in a federal criminal case on direct appeal, it was not allowed to indulge them in reviewing the California Supreme Court's rejection of Richter's claim on the merits. For, under 28 U.S.C. § 2254(d), habeas corpus relief was barred because the state court had adjudicated Richter's claim on its merits. Richter was not entitled to relief unless he showed that the state court's ruling was, not only "wrong," but also "objectively unreasonable" under this Court's "clearly-established" and counsel-deferential *Strickland* v. *Washington* standard. Nothing, however, required the California Supreme Court to anticipate or adopt the Ninth Circuit's novel and dubious view of Sixth Amendment law. And nothing compelled the state court to agree with the Ninth Circuit's views on whether counsel reasonably relied on cross-examination rather than expert opinion as a means of raising a reasonable doubt about Richter's guilt. Finally, nothing compelled the state court to agree with the Ninth Circuit's overly enthusiastic opinion on the likelihood that Richter's proffered expert opinions would have affected the verdict.

Instead, in light of the state record, the California Supreme Court's rejection of Richter's claim was at least "reasonable," so its merits adjudication barred relief under § 2254(d)(1).

1. As Richter conceded below, the California Supreme Court's rejection of his ineffective-counsel claim was an "adjudication on the merits" triggering the deferential-review-for-reasonableness standard of § 2254(d). Nothing in the plain language of § 2254(d) requires, as a condition to deferential review, a written or an "explained" ruling from the state court. Congress undoubtedly was aware that unexplained decisions are common in state and federal criminal and habeas corpus litigation, yet it refrained from imposing any procedural prerequisite to deferential review beyond an "adjudication on the merits." To impose such a requirement by judicial fiat would defeat Congress's intent in adopting the landmark deferential-review reform by largely eviscerating the effect of § 2254(d) in many cases. Instead, Congress recognized, in § 2254(d), that state courts are trustworthy guardians of federal constitutional rights, so that their merits adjudications should be entitled to respect in the federal courts. That is why every circuit court of appeals to have considered the question has recognized that "unexplained" state-court adjudications on the merits of federal claims are entitled to deference under § 2254(d).

Nor does it make any difference that Richter's was a multi-"prong" *Strickland* claim. A claim is the prisoner's substantive request for relief; it comprises all of the components within the application for relief. When a state court rejects a *Strickland* claim as fatally flawed in any substantive respect, it adjudicates the ultimate merits of that claim completely. Federal appellate courts frequently review unexplained district court orders (*e.g.*, rulings on motions to conduct discovery; motions for the appointment of counsel; motions to amend the pleadings, etc.) under a deferential standard. In disposing of many of these cases, the district court considers multiple factors. Yet, such district court decisions are reviewed deferentially under an abuse of discretion standard, notwithstanding the absence of a statement of the lower court's reasoning. Reviewing an unexplained state court decision under the deferential § 2254(d)(1) standard is not fundamentally different. It would be anomalous, and would offend comity, to afford state courts less deference on summary adjudications than district courts enjoy.

2. As a qualifying merits adjudication under § 2254(d), the California Supreme Court's rejection of Richter's claim now precludes federal relief. For Richter cannot show that the ruling was "contrary to," or involved an "unreasonable application" of this Court's clearly-established and deferential *Strickland* v. *Washington* test for effective counsel in light of the unique facts disclosed in the state-court record. That record provided a firm basis for a reasonable conclusion that counsel had not rendered constitutionally-ineffective representation.

First, the state record supported at least a reasonable conclusion that counsel's conduct comported with the norms of competent performance.

Counsel reasonably did not anticipate the prosecution would call expert witnesses about the blood evidence and reasonably chose a strategy of attacking the prosecution witnesses' credibility and highlighting defects in the prosecution's investigation. When the prosecution presented expert evidence at the last minute, Richter's attorney reasonably chose to rely on cross-examination to undermine its significance.

Second, and perhaps more obviously, the record supported a reasonable conclusion that, even if trial counsel should have presented the expert opinion later proffered by Richter in habeas corpus proceedings, it still was not "reasonably probable" that the error affected the verdict. The supposedly impressive expert evidence that Richter presented in the habeas corpus proceedings never challenged, and hardly could have refuted, the most significant evidence proving Richter's guilt. The composition of the "pool of blood" was insignificant in comparison with the evidence of the high-velocity blood spatter on the wall by the couch where Klein was found that irrefutably showed that someone must have been shot on or near the couch. Nor could theories about the source of the blood pool explain why a .22-caliber casing, found by investigators near where Klein lay mortally wounded, just happened to be identical to live rounds found along with loot from the crime in Richter's bedroom the day after the murder.

Given those circumstances and the doubly deferential nature of the federal habeas court's inquiry—according deference to counsel under *Strickland* and deference to the state court under AEDPA—the Ninth Circuit's task was straightforward. Because the state court's merits adjudication was not unreasonable, § 2254(d) dictated that habeas corpus relief "shall not be granted."

3. But, the Ninth Circuit here mishandled the § 2254(d) inquiry. Rather than applying this Court's clearly-established and deferential *Strickland* rule to the facts, the Ninth Circuit applied a novel and dubious rule—one mandating that counsel always must prepare for everything and always must meet forensic evidence with forensic evidence rather than relying on the "greatest legal engine" of cross-examination as a means of establishing reasonable doubt about his client's guilt. This new rule was based on Sun Tzu's martial philosophy rather than on the Framers' Sixth Amendment as interpreted in *Strickland*. Indeed, it was not just new. As a rigid or crystallized corollary requirement, it conflicts with the generalized and deferential *Strickland* standard that reflects this Court's recognition that there is no one way to defend a case.

It is not surprising that, having erroneously adopted that unrealistic standard for counsel's performance, the Ninth Circuit then would err further: both in relying on that rule to condemn counsel as incompetent, and in being too quick to find prejudice from his performance. Nor is it surprising that, having relegated to one brief conclusionary sentence the central question of reasonableness—the "only one that matters" under § 2254(d)—the Ninth Circuit got that ultimate and determinative question wrong too.

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ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S SUMMARY DENIAL OF RICHTER'S INEFFECTIVE-COUNSEL CLAIM QUALIFIES AS A MERITS ADJUDICATION ENTITLED TO § 2254(D)(1) DEFERENTIAL REVIEW

The California Supreme Court summarily denied Richter's ineffective-counsel claim on the merits. That fact remains true regardless whether the state court explained its ruling or whether the underlying claim was comprised of multiple components. So habeas corpus relief is therefore precluded by § 2254(d) unless Richter demonstrates that the state court's adjudication of the claim—including its constituent parts—was objectively unreasonable under this Court's clearly-established law.

A. The California Supreme Court's Rejection Of Richter's Ineffective-Counsel Claim Was An Adjudication On The Merits

1. Richter filed a habeas corpus petition in the California Supreme Court alleging that he was denied his Sixth Amendment guarantee of effective assistance of counsel. JA 7-87. The California Supreme Court summarily denied the petition. JA 129. Under California law, this summary denial constituted a merits determination—that the facts alleged by Richter, even if true, failed to state a prima facie case upon which relief could be granted. *Griffey* v. *Lindsey*, 345 F.3d 1058, 1066, *vacated as moot*, 349 F.3d 1157 (9th Cir. 2003); *Visciotti* v. *Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), *rev'd on other grounds*, 537 U.S. 19 (2002); *Hunter* v. *Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc); see *In re Robbins*, 959 P.2d 311, 340 n. 34 (Cal. 1998); *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 391 (Cal. 1994); *In re Clark*, 855 P.2d 729, 741-42 (Cal. 1993).

2. Under AEDPA, a state-court merits adjudication of a claim brought by a prisoner challenging his conviction or sentence is reviewed for objective unreasonableness under clearly-established law in federal habeas corpus proceedings. In particular, 28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

> granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

3. It is not significant that the state court's ruling expressed no articulation of the precise rationale behind its decision. Neither the language of the statute, nor the policies underlying the writ-restricting reforms enacted in AEDPA, demonstrate any intent on the part of Congress to require state courts to justify their rulings. When evaluating the reasonableness of a state court's summary denial of a federal constitutional claim, a federal habeas court assumes that the state court applied the proper "clearly established Federal law," and then determines whether its decision was "contrary to" or was "an objectively unreasonable application of" that law. *Schaetzle* v. *Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003) (citing *Catalan* v. *Cockrell*, 315 F.3d 491, 493 & n. 3 (5th Cir. 2002)). A federal habeas corpus court's review is therefore restricted to the reasonableness of the state court's "ultimate decision, not every jot of its reasoning." *Santellan* v. *Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (citing *Cruz* v. *Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (even where a state court makes a mistake in its analysis, "we are

determining the reasonableness of the state court's 'decision,' . . . not grading their papers.")), *cert. denied*, 535 U.S. 982 (2002).

Nor is it significant that a "claim," such as Richter's ineffective-counsel claim, is comprised of two components. The state court's rejection of *the claim* remains a merits adjudication nonetheless. And there is no basis for presuming that the state court declined to consider both components of the claim. Richter, who has the burden of establishing entitlement to relief, certainly has not established that the state court adjudicated his claim only on a single component. Indeed, Richter in these lengthy federal proceedings has never disputed—in the district court or before the Ninth Circuit three-judge or en banc panels—that the California Supreme Court's merits adjudication of his claim was entitled to the full measure of deference afforded by § 2254(d).

B. The Plain Meaning Of § 2254(D) Manifests Congress's Intent To Afford Deferential Review To Summary Merits Decisions Of The State Courts

1. The task of interpreting § 2254(d) begins with its language. *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000). Words in a statute are to be given "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Id.* at 431 (internal quotation marks and citations omitted). Indeed, "[t]he plain

meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Thus, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005) (quotation marks and citations omitted).

The language of § 2254(d) makes it clear that a state court is not required to explain the basis for its ruling in order for it to qualify for deferential review in federal court. The only prerequisite to obtaining deferential review is that the claim "was *adjudicated on the merits* in State court proceedings. . . ." 28 U.S.C. § 2254(d)(1) (emphasis added). "Adjudicated" is unambiguous: it refers to the judicial resolution of a legal dispute. See Black's Law Dictionary 45 (8th ed. 2004) (adjudicate: "1. To rule upon judicially. 2. adjudge"); Webster's Third New International Dictionary 27 (2002) (adjudicate: "to settle finally (the rights and duties of the parties of a court case) on the merits of issues raised: enter on the records of a court (a final judgment, order or decree of sentence)"). The plain language of the statute focuses on the result—a merits adjudication—as opposed to the "process" that led to that result. The existence of a merits adjudication is all that the statute requires. A state court decision is no less an "adjudication" on the merits simply because the state court did not explain why the claim lacked merit.

2. This interpretation is confirmed by other language in § 2254(d)(1) providing that habeas relief is barred unless the state court's merits adjudication "resulted in a decision" that was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. A judicial decision and a judicial opinion are not the same thing. A "decision" under § 2254(d)(1) as "a legal judgment rendered 'after consideration of facts, and . . . law.'" *Williams*, 529 U.S. at 385 (opinion of Stevens, J., in which Souter, Ginsburg, and Breyer, JJ., joined) (emphasis omitted) (quoting Black's Law Dictionary 407 (6th ed. 1990)). An "opinion" is "[a] court's written statement explaining its decision in a given case, usu[ally] including the statement of facts, points of law, rationale, and dicta." Black's Law Dictionary 1125 (8th ed. 2004). In choosing the term "decision" as opposed to either "opinion" or a comparable term denoting a written opinion, Congress confirmed its intention to afford § 2254(d)(1) deference to all state-court merits adjudications, regardless of whether the basis for the merits adjudication is stated. See *McDermott Intern., Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) (absent a contrary indication, it is presumed that Congress's use of a term of art in a statute is intended to have its established meaning).

3. Congress presumably was aware at the time it enacted AEDPA of the prospect, if not the prevalence, of summary or unexplained state-court rulings in criminal and habeas corpus cases. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"). It is a common practice of both state and federal courts to issue unexplained decisions. See *Muth* v. *Frank*, 412 F.3d 808, 815 (7th Cir. 2005) and cases cited therein; see also *Harris* v. *Superior Court*, 500 F.2d 1128 (explaining California's "postcard" denials). And, clearly, many criminal and habeas corpus claims arising in state courts do not warrant expenditure of judicial resources in issuing explained or written opinions.

Yet Congress declined to include a reasoned-decision requirement in § 2254(d). Instead, Congress conditioned § 2254(d) deferential review only on the state court having adjudicated the claim—whether explained or not—on the merits. Imposing the condition that state courts must explain the basis for their decisions would necessarily require adding language to an unambiguous statute—no less one that is part of a detailed and comprehensive statutory scheme. See *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 572 (1983) ("However correct these assertions may be, they do not authorize us to add specific language that Congress did not include in a carefully considered statute"). The courts should not "assume this role." *Koon* v. *United States*, 518 U.S. 81, 108-09 (1996).

4. Limiting deferential review to written or explained state court decisions, further, would be inconsistent with AEDPA's purpose "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams*, 529 U.S. at 404). Indeed, denying deferential review to the unexplained merits adjudications that make up a large part of state criminal and habeas corpus practice would eviscerate the cornerstone reform of habeas corpus embodied in § 2254(d).

This Court has recognized that it has "no power to tell state courts how they must write their opinions." *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991); see *Arizona* v. *Evans*, 514 U.S. 1, 7 (1995) (reaffirming presumption that state-court decisions are on the merits "to obviate the 'unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court'") (quoting *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983)). And state courts, faced with "overcrowded dockets," cannot be expected to articulate decisions in every case and are "insufficiently motivated" to do so simply because of the specter of federal review. *Coleman*, at 738-39. For example, the California Supreme Court has explained that its habeas corpus adjudications are not drafted to insulate the decisions from federal review, but for "quite different" state institutional goals of preserving the integrity of the state appellate and collateral review practice. *In re Robbins*, 959 P.2d at 315 n. 1. It is hardly surprising that state courts do not write opinions for the benefit of federal court review, for state courts are not bound by the rulings of intermediate federal courts. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 58 fn. 11 (1997).

Given the reality of state court caseloads, precluding deferential review for summary or unexplained dispositions would be antithetical to AEDPA's further objectives of promoting judicial efficiency and conserving judicial resources. See *Panetti*, 551 U.S. at 945-96; *Schriro* v. *Landrigan*, 550 U.S. 465, 474-75 (2007). State courts in California dispose of nearly 20,000 criminal habeas corpus petitions each year. 2009 Court Statistics Report, Statewide Caseload Trends. See http://www.courtinfo.ca.gov/reference/documents/csr-2009.pdf. The overwhelming number of these cases are brought by pro se prisoners, frequently alleging a plethora of claims. Adjudicating these actions requires a substantial expenditure of judicial resources. See FAIR PRESENTATION AND EXHAUSTION: THE SEARCH FOR IDENTICAL STANDARDS, 31 Cardozo L. Rev. 581, 595-96 (2009) (the "poor quality of pro se petitions makes sifting through such petitions a real challenge" for courts). Many cases, moreover, do not warrant expenditure of judicial resources in issuing explained or written opinions; it is a common practice of both state and federal courts to issue unexplained decisions. For instance, in the fiscal year 2007-2008, for example, the California Supreme Court issued few, if any, written opinions in the 3,476 criminal, noncapital habeas corpus petitions disposed of in original proceedings. In the same fiscal year, the California Court of Appeal issued written opinions in only 183 of the 6,806 dispositions of original proceedings in criminal matters.[3]

Denying § 2254(d) deference to unexplained state-court decisions also would imply, unjustifiably, that these adjudications are not well-reasoned and are the product of a dereliction of judicial duty. Such "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Visciotti*, 537 U.S. at 24. Indeed, "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 240 n. 2 (1985). And such an approach would be inconsistent with "the settled view that elected judges of our state courts are fully competent to decide federal constitutional issues, and that their decisions must be respected by federal district judges in processing habeas corpus applications pursuant to 28 U.S.C. § 2254." *Swain* v. *Pressley*, 430 U.S. 372, 383 (1977).

As this Court has observed, "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). The purpose of AEDPA is to promote "'comity, finality, and federalism' by giving state courts 'the first opportunity to review [a federal constitutional] claim,' and to 'correct' any 'constitutional violation in the first instance.'" *Jimenez* v. *Quarterman*, ___ U.S. ___, 129 S.Ct. 681, 686 (2009) (quoting *Carey* v. *Saffold*, 536 U.S. 214, 220 (2002)). Nothing in the statute suggests that Congress intended to diminish the state courts' historical role as co-equal arbiters of the Constitution.

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[3] 2009 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS. See http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf.

5. Although this Court has not explicitly addressed whether summary merits adjudications are entitled to deferential review under § 2254(d), see *Smith* v. *Spisak*, ___ U.S. ___, 130 S.Ct. 676, 688 (2010), prior decisions point decisively in that direction. In *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam), a Ninth Circuit panel concluded that § 2254(d) did not preclude relief where the state court decision did not cite any federal law, "much less the controlling Supreme Court precedents." *Id.* at 8. This Court reversed, explaining that "[a]voiding [§ 2254(d)'s] pitfalls does not require citation of our cases—indeed, it does not even require *awareness* of our cases. . . ." *Id.* (emphasis in original). In *Weeks* v. *Angelone*, 528 U.S. 225 (2000), this Court applied the § 2254(d) standard even though the state court had summarily denied the federal claim without explanation. *Id.* at 237; see also *Rompilla* v. *Horn*, 355 F.3d 233, 247-48 (3d Cir. 2004) (Alito, J.) ("a state

court may render an adjudication or decision on the merits of a federal claim by rejecting the claim without any discussion whatsoever," citing *Weeks*), reversed on other grounds by *Rompilla* v. *Beard*, 545 U.S. 374 (2005); see *Ylst* v. *Nunnemaker*, 501 U.S. 797, 806-07 (1991) (White, J. concurring) (explicit statement from a state court that it is ruling on the merits is a ruling on the merits for habeas purposes even if the ruling is summary in nature).

C. A State Court Merits Adjudication of a Federal Constitutional Claim is Reviewed Deferentially Even If the Claim has Multiple Components

The fact that Richter raises an ineffective-counsel claim—which consists of deficiency and prejudice components—makes no difference for purposes of the § 2254(d) analysis. See *Strickland* v. *Washington*, 466 U.S. at 687 (indentifying the two components). As lower federal courts have recognized, the principle that unexplained state-court merits decisions are reviewed deferentially under § 2254(d) applies equally to claims of ineffective assistance of counsel. See, *e.g.*, *Luna* v. *Cambra*, 306 F.3d 954, 960 (9th Cir. 2002); *Sellan* v. *Kuhlman*, 261 F.3d 303, 310-12 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F.3d 149, 158-62 (4th Cir. 2000) (en banc); *Miller* v. *Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); *James* v. *Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

Richter might argue that, because its summary disposition does not on its face disclose whether the California Supreme Court rejected his ineffective-counsel claims on both *Strickland* components, the claim should be reviewed *de novo* in the federal court. But there is no basis for assuming that the state supreme court did not consider Richter's entire claim in denying relief. The state supreme court did not say that its adjudication was confined to a single prong. And to suggest that the court only considered part of Richter's claim is altogether speculative.

In any event, the state court adjudicated the *Strickland* claim on the merits; and its adjudication on the merits therefore is entitled to deferential review in federal court under the plain terms of § 2254(d). A claim is the prisoner's substantive request for relief; it comprises all of the components within the substantive request for relief. See Black's Law Dictionary 264 (8th ed. 2004) (defining "claim" as "[t]he aggregate of operative facts giving rise to a right enforceable by a court"); *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005) (defining "claim" as an "asserted federal basis for relief from a state court's judgment of conviction"). The result of a state court decision is the ultimate disposition of the claim. See Webster's Third New International Dictionary 1937 (2002) (defining "result" as "something that results as a consequence, effect, issue, or conclusion").

As the applicant seeking relief, then, Richter bears the burden of demonstrating that the state court applied clearly established Supreme Court precedent in an objectively unreasonable manner. 28 U.S.C. § 2254(d)(1); *Visciotti*, 537 U.S. at 24-25 ("it is the habeas applicant's burden to show that the state court applied [that case] to the facts of his case in an objectively unreasonable manner"). Federal courts, of course, are well-acquainted with deferential review of unexplained orders. In the § 2254 context, in particular, federal appellate courts are frequently called upon to review unexplained district court orders under a deferential standard. Examples include motions to conduct discovery, Rule 6 of the Rules Governing Section 2254 Cases in the United States District (Habeas Rules); motions to expand the record, Rule 7 of the Habeas Rules; motions for an evidentiary hearing, Rule 8 of the Habeas Rules; motions for the appointment of counsel, Rule 8(c) of the Habeas Rules, 18 U.S.C.A. § 3599; motions to amend the pleadings, Fed. R. Civ. P. 15(a); motions to amend findings, Fed. R. Civ. P. 52(b); motions for new trial, Fed. R. Civ. P. 59(a); motions to alter or amend the judgment, Fed. R. Civ. P. 59(e); motions for reconsideration; motions for corrections based on a clerical mistake, oversight, or omission, Fed. R. Civ. P. 60(a); motions to be relieved from a final judgment, order, or proceeding, Fed. R. Civ. P 60(b); and motions to extend the time to appeal, Fed. R. App. P. 4(a)(5)(A)(i) & (ii).[4] Many of these issues require the district court's consideration of multiple factors. Yet, in each of these circumstances, the district court's decision is reviewed deferentially under an abuse of discretion standard,[5] notwithstanding the absence of a statement of the lower court's reasoning. Reviewing an unexplained state court decision under the deferential § 2254(d)(1) standard is not appreciably different. It would be anomalous to afford state courts lesser deference on summary adjudications than district courts enjoy. See *Francis* v. *Henderson*, 425 U.S. 536, 542-43 (1976).

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[4] Other examples include a district court's review of a magistrate judge's unexplained ruling on a non-dispositive matter under the "clearly erroneous or contrary to law" standard, 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a), a federal circuit court's review of a district court's unexplained finding of fact under the clearly erroneous standard, Fed. R. Civ. P. 52(a), and a federal court's review of a state court's implied or unarticulated findings of fact under the deferential standards of § 2254(d)(2) and (e)(1), 16A Federal Procedure, Lawyers Edition § 41.341 (2010).

Similarly, this Court has approved or reviewed silent decisions in a variety of contexts and based only the circumstances of the case. See, *e.g.*, *Renico* v. *Lett*, 559 U.S. ___ (No. 09-338; decided May 3, 2010) (denial of motion for mistrial); *Parker* v. *Dugger*, 498 U.S. 308 (1991) (Florida court rejects jury recommendation of life imprisonment); *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (excusal of juror for cause); *Coleman* v. *Thompson*, 501 U.S. at 740-44 (dismissal order). Of course, this Court has long relied on the settled rule of affirming lower court decisions that reach the correct result even if the lower court relied upon the wrong ground. *Schenck* v. *Pro-Choice Network of Western New York*, 519 U.S. 357, 384 n. 12 (1997).

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[5] See Means, FEDERAL HABEAS MANUAL, §§ 4:32, 5:9, 6:13, 8:47, 9A:154; 12:3, 12:4, 12:5, 12:57, 13:51 (West 2010) (identifying abuse of discretion standard for various district court rulings).

Declining to give deference to the California Supreme Court's summary denial of Richter's *Strickland* claim would have particularly unjustified and far-reaching consequences. Most apparent would be the erosion of AEDPA policies with respect to one of the most commonly asserted claims alleged by state prisoners challenging their conviction or sentence—that of "ineffective assistance of counsel." FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CONVICTIONS, 31 Cal. W. L. Rev. 237, 250 (Spring 1995) (noting that over forty percent of the claims raised by California state prisoners are for ineffective assistance of counsel). And the problem would not end there. Many other types of federal claims are comprised of multiple components or factors. See, *e.g.*, *Waller* v. *Georgia*, 467 U.S. 39, 48 (1984) (four-factor test for determining whether public access to a courtroom in a criminal case may be restricted); *Solem* v. *Helm*, 463 U.S. 277, 292 (1983) (three-factor test for Eighth Amendment cruel and unusual punishment claims); *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979) (three-component test for fair-cross-section claims); *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972) (five-factor test for determining whether identification procedure is impermissibly suggestive); *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972) (four-factor test for evaluating a speedy trial claim); *Brady* v. *Maryland*, 373 U.S. 83, 96 (1963) (three-component test for claim based on the prosecutorial suppression of evidence).

If summary adjudications of *Strickland* claims are not reviewed deferentially under § 2254(d), then summary adjudications of other claims comprised of multiple factors or components also would be susceptible to the argument that they must be reviewed *de novo* rather than deferentially for reasonableness.

It is true that this Court in *Rompilla* v. *Beard*, 545 U.S. 374 (2005), and *Wiggins* v. *Smith*, 539 U.S. 510 (2003), reviewed *de novo* the prejudice component of the habeas petitioners' *Strickland* claims where the state courts, having concluded that the deficient-performance component was not established, made it clear that they had not reached the prejudice component. This Court held that the state courts' rulings on deficient performance were "unreasonable" applications of *Strickland* under § 2254(d)(1), and then, noting the absence of state courts ruling on the issue, reviewed the prejudice component *de novo*. *Rompilla*, 545 U.S. at 389-90; *Wiggins*, 539 U.S. at 534. In those cases, however, the state courts *said* they were not reaching the question of prejudice. Here, in contrast, the California Supreme Court made no such attestation. That is, the state supreme court did not signal, in denying Richter's *Strickland* claim on the merits, that it had limited its adjudication to just one component. Neither *Wiggins* nor *Rompilla* control on the question of silent rulings where the state court does not disclaim reaching one of the prongs of the *Strickland* test.

Because the language of 2254(d)(1) prohibits the granting of federal habeas relief *unless* the petitioner can show either that the state court's adjudication of the claim was "contrary to, or involved an unreasonable application of" this Court's precedent, the state does not have to prove that its disposition of a federal constitutional claim was right. *Woodford* v. *Visciotti*, 537 U.S. at 24 (AEDPA "demands that state-court decisions be given the benefit of the doubt.") Instead, it is the petitioner's burden to show that the state court's disposition of his federal constitutional claim was unreasonable.

Although the California Supreme Court's ruling on Richter's two-pronged *Strickland* claim was "unexplained," the state court nonetheless adjudicated the claim on its merits within the meaning of § 2254(d). Accordingly, that ruling is entitled to full deferential review under AEDPA: That is, "relief shall not be granted" *unless* Richter shows that the ruling was "contrary to" or involved an "unreasonable application" of "clearly established Federal law." But, as demonstrated in Argument II, *post*, the state supreme court's adjudication was reaonable under *Strickland* and therefore precludes federal habeas corpus relief.

II. BECAUSE THE CALIFORNIA SUPREME COURT'S REJECTION OF RICHTER'S CLAIM WAS OBJECTIVELY REASONABLE, § 2254(D) PRECLUDES RELIEF; THE NINTH CIRCUIT VIOLATED § 2254(D) BY INVOKING ITS OWN ECCENTRIC SIXTH AMENDMENT RULE AND FAILING TO DEFER TO THE STATE COURT'S REASONABLE RULING

Richter's counsel confronted the daunting job of vindicating his client's complete denial of any involvement in the crimes in the face of strong evidence of his guilt: incontrovertible physical evidence that Klein had been shot with two different guns; the eyewitness testimony of a surviving victim identifying Richter as one of the two burglars; and the discovery in Richter's house of bullets that matched the brand and caliber of the expended casing found near Klein's body. Counsel reasonably chose to attack the credibility of the drug-dealing survivor and to exploit deficiencies [illegible] the police investigation.

When the trial court permitted the prosecutor to present evidence developed mid-trial from a serologist and a blood-spatter expert, Richter's counsel met it by cross-examining them to good effect. The serology expert admitted that she had not tested the stains for cross-contamination. And the blood-spatter expert admitted—consistently with Richter's testimony about seeing Klein on the floor—that it was unlikely that Klein had been lying down on the couch when he was shot. Indeed, Richter's counsel got the blood spatter expert to admit that he could not "use the blood evidence to establish" where Klein had been when he suffered the non-fatal neck wound.

Later, in habeas corpus proceedings, Richter presented various expert opinions that purported to prove that (1) the prosecution serologist's testimony was not credible because she had incorrectly concluded that only Johnson's blood was in the sample taken from the crime scene, and (2) the prosecutor's theory—laid out in his closing argument—of how the blood pool was formed (that Johnson bled while standing in the doorway waiting for the Sheriff's deputies to arrive at the house) was "scientifically unreliable." But Richter's experts never addressed the most salient forensic evidence that supported the prosecution's case against Richter. For example, the high-velocity blood spatter on the wall near the couch that established beyond cavil that *someone* had to have been shot on or very near the couch. Nor do Richter's experts offer any explanation for the expended .22-caliber casing near the couch where Klein lay mortally wounded that was exactly the same brand as live bullets loaded in a magazine for a semiautomatic pistol that was found in Richter's bedroom the day after the crimes were committed. Finally, none of Richter's habeas experts proffer any credible explanation for how Klein could have been moved from the bedroom doorway onto the couch without leaving any visible trail of blood.

The California Supreme Court's summary rejection of Richter's ineffective-assistance-of-counsel claim was objectively reasonable—especially given the wide latitude afforded by "double deference" review of *Strickland* claims under § 2254(d). Richter's allegations, even if true, did not compel the conclusion that counsel's performance had been deficient under prevailing professional norms. Certainly, this Court has never required counsel to prepare for the possible presentation of forensic evidence the prosecution has neither disclosed nor expressed an intention to present before the start of trial—much less required counsel to be prepared for "any contingency." Nor has this Court ever laid down a rigid rule requiring the defense to meet forensic evidence with forensic evidence of its own rather than to choose to rely on effective cross-examination of the prosecution's expert witnesses.

Nor, in any event, did Richter's proffer of new expert-opinion evidence compel the conclusion that there was a reasonable probability that the defense was prejudiced so as to undermine the reliability of the verdict. Here, it is reasonable to conclude that the new opinion evidence presented in habeas corpus was too equivocal and speculative and that it would not have accomplished anything significant beyond what counsel had accomplished in cross-examining the prosecution's witnesses.

In granting Richter habeas corpus relief, the Ninth Circuit erred under § 2254(d) in two basic ways. First, rather than afford the California Supreme Court's decision rejecting Richter's *Strickland* claim the deference to which it is entitled, the court of appeals deemed the state court's implicit finding that

Richter's counsel was not deficient "objectively unreasonable." Second, rather than apply *Strickland*'s general and deferential rule regarding counsel's performance (see 466 U.S. at 689), the court of appeals instead held that counsel must prepare for "any contingency"—in particular the presentation of the prosecution blood experts—and to meet expert-opinion evidence with expert opinion. Contrary to the Ninth Circuit's approach, "AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, 559 U.S. ___, slip opn. at p. 12.

A. The California Supreme Court's Rejection Of Richter's Claim Was Objectively Reasonable And Therefore Precludes Relief Under § 2254(d)

Under 28 U.S.C. § 2254(d), habeas corpus relief "shall not be granted" if the state court's adjudication of the merits of the prisoner's claim is at least a "reasonable" application of this Court's "clearly established" law. *Renico* v. *Lett*, slip opn. at p. 5 (citing *Williams* v. *Taylor*, 529 U.S. at 410). Where a state prisoner alleges ineffective assistance of counsel, the "clearly established Federal law" is this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668. Defendants must show that counsel's performance was unreasonable under the then-prevailing professional norms, and a "reasonable probability" that any incompetent performance affected the outcome of the case. See *id.* at 687-96. In evaluating the reasonableness of counsel's preparation for trial, the court must consider such difficult decisions as how to allocate investigative resources, which avenues of investigation are worth pursuing further, which witnesses to subpoena or call to the stand, and whether to present an affirmative defense or simply make the government meet its burden. Such decisions are pre-trial and trial strategy issues about which competent counsel might reasonably disagree. As this Court has noted: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689.

The *Strickland* standard is itself deferential to trial counsel. Thus, federal review under § 2254(d) of a state court's *Strickland* ruling must be "doubly deferential." See *Knowles* v. *Mirzayance*, 556 U.S. ___, 129 S.Ct. 1411, 1420 (2009); *Yarborough* v. *Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam).

The California Supreme Court's rejection of Richter's ineffective-counsel claim easily passes muster under the "doubly deferential" review required by the combination of § 2254(d) and *Strickland*. The state-court record provided a reasonable basis for rejecting the ineffective counsel claim on "competent performance" grounds or in any event on "no prejudice" grounds. And, as this Court has held: "The question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Id.*, 129 S.Ct. at 1420.

1. It Was Reasonable For The State Court To Credit, As Competent, Counsel's Reliance On Cross-Examination Rather Than On Expert Testimony

The state-court record provided a reasonable basis for the California Supreme Court to conclude that counsel's challenged decision—to refrain from presenting expert-opinion testimony, but to counter the prosecutor's blood evidence by minimizing it through cross-examination instead—constituted competent performance.

A proper view of the case from counsel's perspective at the time provides reasonable support for the conclusion that Richter's counsel was not deficient. He was confronted by the indisputable fact that Klein had been shot by two different firearms. Near where Klein was shot, investigators found a spent .22-caliber casing that matched live cartridges and a magazine for a semi-automatic pistol later found in Richter's bedroom. The inevitable inference was that Richter had shot Klein with a .22-caliber firearm while Branscombe had shot Klein with a .32-caliber handgun. Richter's counsel thus had to explain how Klein happened to have been shot inside Johnson's house by two different firearms, while

Richter supposedly sat outside in his truck. Also bearing on Richter's counsel's predicament was the fact that Richter, after his arrest, had made tape-recorded statements to Branscombe reflecting a consciousness of guilt. And, of course, counsel had received no notice of the prosecution's intention to either test, or to present expert testimony about, the blood samples from the crime scene. Indeed, counsel knew that the prosecution had neither tested nor preserved samples of the photographed blood in the pool by Johnson's bedroom door.

In addition, a choice for cross-examination was proper as cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." And, in fact, counsel cross-examined the state's experts effectively. He succeeded in wresting from prosecution expert Spriggs her acknowledgment that she could not rule out the possibility that Klein's blood, and not just Johnson's, had been present in the sample of blood taken from the bedroom wall. Similarly, blood-spatter expert Bell admitted that he could not be certain where Klein had been positioned in relation to the couch when he was shot because of the absence of any bullet hole in the armrest. Recognizing the inherently speculative nature of the prosecution's blood spatter evidence, counsel reasonably chose to counter that evidence via cross-examination alone.

That the state court ruling was at least a "reasonable" application of *Strickland's* "performance" standard (129 S.Ct. at 1420) is buttressed by the fact that the federal district judge went further and found that counsel's performance indeed was competent. The district judge explained:

> [Counsel]'s pretrial investigation and study led him to the belief that the trial would be primarily a credibility case. AD at 51. The State implicitly agreed with [counsel] by not preparing a blood spatter analysis or even testing any of the blood samples taken from the crime scene. Given the lack of blood evidence developed by the State prior to trial, [counsel]'s failure to find and produce the expert testimony at issue does not fall below the standard.
>
> [Counsel]'s failure to find and call [his own blood] experts after he was surprised at trial by the sudden presentation of expert blood spatter and serology testimony was . . . reasonable. [Counsel] did what he could under the circumstances. [Counsel] objected to Bell being called as an expert witness, moving to exclude the testimony and/or for a preliminary facts hearing; both motions were denied. AD at 152. [Counsel] objected to the surprise expert testimony on serology and requested more time to prepare; this motion was denied as well. AD at 35, 48, 77. [Counsel] spent the night studying serology and the State's expert's report at the library to prepare for cross-examination. AD at 78-82.

App. 39a-40a.

This Court's clearly-established *Strickland* jurisprudence has never required counsel to prepare for the presentation of evidence the prosecution had ignored until the start of trial or to meet forensic evidence in a particular way different from cross-examination. On the record presented to it, the California Supreme Court correctly—and in any event reasonably—could conclude that Richter's counsel's performance was not deficient under *Strickland*.

2. Given The Evidence Of Guilt, And The Debatable Difference Between The Effect Of Counsel's Cross-Examination Versus The Inconclusive And Speculative "Expert" Opinion Offered After The Trial, The State Court's Ruling Also Was Reasonable Under The Prejudice Component Of The *Strickland* Test

The state-court record also provided the requisite reasonable support for the conclusion that counsel's decision not to consult with and/or present an expert to counter the State's forensic blood evidence did not result in any "reasonable probability" of prejudice. *Strickland*, 466 U.S. at 695-96. Contrary to the Ninth Circuit's analysis, the blood evidence was in no way crucial to the defense case.

In the first place, Richter's claim of prejudice is a chimera because the source of the blood pool can never be known as it was not preserved at the crime scene and has never been analyzed by any forensic scientist. Moreover, Richter has never disputed Detective Bell's testimony that (1) there was high velocity blood spatter on the wall near the couch indicating someone had been shot on or very near the couch, and (2) there was no evidence of a trail of blood leading from the bedroom door to the couch which would suggest that Klein had ever been moved from one part of the house to another after he had been shot. In the absence of some plausible explanation for how Klein could have been moved without leaving any blood trail, and how high velocity blood spatter got on the wall near the couch other than by someone being on or near the couch when shot, the defense's "shootout" theory was doomed to fail—no matter how many alternative theories could be propounded to explain the so-called blood pool. As the dissent observed, "although Richter's experts raise more hypothetical situations than did counsel on cross-examination in which a combination of Johnson and Klein's blood would create [the state serologist]'s result, they are still merely hypothetical and have no basis in the actual facts of the case." App. 169a-170a n. 12.

The "evidence" that Richter and the Ninth Circuit say would have been uncovered by competent counsel consists of proffered expert opinion that Johnson *could not have caused* the blood pool if he was standing in the doorway waiting for the police to arrive.[6] With such expert testimony, so Richter's argument goes, the jury then would have found more credible Richter's testimony that he had seen Klein lying on the floor rather than on the couch where he lay when the police later arrived. This, the argument continues, somehow would have proved that Klein was killed in a crossfire between Johnson and Branscombe—and not, as the prosecutor asserted, while Klein lay sleeping on the couch.

But—largely because no samples from the pool of blood were obtained or preserved—none of Richter's proffered habeas corpus experts could offer more than mere speculation that Klein's blood *might have been* in the pool. And, as Judge Bybee's dissenting opinion pointed out, none of Richter's habeas corpus experts has ever proffered an opinion challenging Detective Bell's testimony in regard to the blood stains on Klein's face or the high velocity spatter near the couch where he was found by the police. App. 186a. This evidence, which Richter's experts have never disputed, clearly shows that *someone* was shot on or very near the couch.

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[6] The Ninth Circuit's mischaracterization of Richter's habeas experts' opinions as "undisputed" (see, e.g., App. 126a) apparently derives from nothing more than the State's unexceptional stipulation that, if Richter's federal habeas experts were called to testify in the district court at an evidentiary hearing, their testimony would be consistent with the content of their declarations—nothing more. The State has *never conceded* that this equivocal, speculative testimony, if presented at trial, would have undermined the People's case regarding the circumstances surrounding the murder of Patrick Klein

In addition, none of Richter's habeas experts has offered an explanation of how "the drug-addled, intoxicated, 5'10", 155 pound Johnson [c]ould have [performed] an athletic feat of nearly Olympic proportions [by moving] Klein from the bedroom doorway to the couch" without leaving any smears or a trail of blood. App. 186a-187a. Richter's blood spatter expert and pathologist sidestepped this issue by contending that the prosecutor's claim that Johnson alone caused the blood pool while waiting for the arrival of the police is "scientifically unreliable." But, as the dissent observed, all Richter's experts' opinions mean is "that the blood couldn't have originated from Johnson while he was standing up." App. 188a.

The dissenting opinion correctly observed that the presentation of Richter's habeas experts' opinions at trial would not have yielded more persuasive evidence of Richter's innocence. The testimony of the pathologist, for example, would merely have repeated "the defense's overarching theory, echoed by defense counsel throughout the trial," that the criminal episode had to have occurred much earlier in time than Johnson said it had occurred. App. 179a. And while his own blood spatter expert "might have been helpful in general, [Richter's counsel] had no reason to believe that blood spatter testimony would definitively indicate that Klein or Johnson created the blood pool." *Id.* at 184a.

Just as important, even if the opinion evidence that Richter and the Ninth Circuit are so enamored of had been presented at Richter's trial, it would not have addressed the compelling physical evidence that tied Richter directly to the crimes: the expended .22-caliber cartridge, found near the couch where Klein lay mortally wounded, that was exactly the same as live bullets found in Richter's bedroom by police investigators; and the discovery of Johnson's stolen gun safe and backpack in the same location. And it could hardly have been a mere coincidence that the police fortuitously found among Richter's belongings a firearm magazine of a type usable with a semi-automatic handgun capable of firing .22-caliber bullets—but no handgun.

The jury could hardly have overlooked the fact that neither the .32-caliber handgun that Branscombe had been seen cleaning in Johnson's house before the murder and the .22-caliber semi-automatic firearm used to shoot Klein were never found. This evidence is especially damning in light of Richter's admission that he and Branscombe had discarded clearly incriminating evidence in the marsh.

The four dissenting judges on the en banc court, the three judges on the original panel, and the district judge got it right. In departing from "doubly-deferential" review under *Strickland* and § 2254(d), the Ninth Circuit got the question of whether the state court's adjudication was at least "reasonable"—"the only question that matters"—wrong. See *Lockyer*

v. *Andrade*, 538 U.S. 63, 71 (2003). Reversal is warranted.

B. The Ninth Circuit Deviated From The AEDPA Standard Of Review By Invoking Its Own Eccentric Sixth Amendment Rule

In *Strickland*, this Court observed that "no particular set of detailed rules" could "satisfactorily take account of the variety of circumstances faced by defense counsel." 466 U.S. at 688-89. A court considering an ineffective-counsel claim must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case." *Id.* at 690. Rather than afford Richter's trial counsel's performance the "strong presumption" of reasonableness to which it is entitled under *Strickland*, however, the Ninth Circuit erected its own standard of conduct predicated on the martial philosophy of Sun Tzu and then deemed Richter's counsel's performance prejudicially deficient. The Ninth Circuit's failure to adhere to the strictures of AEDPA should not be countenanced.

In *Knowles* v. *Mirzayance*, 129 S.Ct. at 1411, this Court confirmed that, under 28 U.S.C. § 2254(d)(1), federal habeas relief may be granted on an ineffective-counsel claim *only if* the state-court decision unreasonably applied the general and deferential standard established by *Strickland*. It cannot be "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific ineffective-counsel rule that has not been squarely established by this Court. *Mirzayance*, 129 S.Ct. at 1419; *Wright* v. *Van Patten*, 552 U.S. 120, 124-26, (2008) (per curiam); *Schriro* v. *Landrigan*, 550 U.S. 465, 478 (2007); see *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006); *Williams* v. *Taylor*, 529 U.S. 362, 412-13 (2000).

Yet the Ninth Circuit in this case granted habeas corpus relief on the basis of the novel rule that counsel is obliged to consult with and/or present "forensic experts regarding critical issues in the case." App. 119a. But this Court has never held that defense counsel *must* consult with and/or present experts in every case in which expert opinion testimony *could* prove useful. Similarly, no opinion of this Court holds that defense counsel *must* invariably respond in kind to expert evidence presented by the prosecution rather than employ other, equally effective methods such as cross-examination.

Here—much like in *Mirzayance*—the Ninth Circuit created and applied its own, different standard for attorney competence. Relying on Sun Tzu's philosophy of war, rather than on this Court's precedent recognizing that there are innumerable ways for a lawyer to render competent assistance in a given case (see, *e.g.*, *Strickland*, 466 U.S. at 689 ["[t]here are countless ways to provide effective assistance in any given case"]), the Ninth Circuit in effect laid down a *per se* rule requiring counsel to investigate and to produce expert-opinion testimony.

This eccentric Circuit rule applies regardless whether counsel could reasonably conclude that such investigation would not be promising or would simply produce equivocal results. App. 110a-120a.

Contrary to the Ninth Circuit's rigid approach, this Court has eschewed mechanistic rules governing what counsel must do in order to effectively represent his client. See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000) (citing 466 U.S. at 689). Thus, in *Strickland* this Court wrote:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

466 U.S. at 688-89.

This Court repeatedly has explained that defense counsel need not exhaustively investigate every avenue of defense. See, *e.g.*, *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987) (The question is not "what is prudent or appropriate, but only what is constitutionally compelled.") (quoting *United States* v. *Cronic*, 466 U.S. 648, 665 n. 38 (1984)). Rather, counsel must use reasonable professional judgment in deciding which lead to pursue and which lines of attack will be a waste of investigative time. The dissent below astutely noted that the court of appeals' "decision will force counsel to seek expert advice at every stage of the proceedings, even when counsel believes that it will detract from the other issues counsel must confront." App. 139a. Nothing in this Court's Sixth Amendment jurisprudence even hints at such an expansive obligation on the part of defense counsel in the routine case.

Citing Circuit law, rather than the law as clearly established by this Court's precedents as required by § 2254(d), the en banc majority opinion invoked a "rule" that "counsel *must* . . . *present* to the jury *any evidence* he finds that tends to show his client's innocence, tends to undermine the prosecution's case, or raises a reasonable doubt as to his client's guilt." App. 110a. It somehow cannot be enough, in the en banc majority's idiosyncratic opinion, for counsel to rely on cross-examination—"beyond any doubt the greatest legal engine ever invented for the discovery of truth," 5 J. Wigmore, Evidence 32 [§ 1367] (J. Chadbourn rev. ed. 1974)—to make the defense's point. Instead, even while constrained to recognize that cross-examination of the State's witnesses may establish reasonable doubt, the Ninth Circuit imposed its own rule that "[l]eaving the jurors to believe or disbelieve defendants solely on the basis of their own testimony, without supporting evidence, where such evidence could be obtained with diligent investigation, is objectively unreasonable." *Id.*, at 114a.

In essence, under the Ninth Circuit's novel rule, defense counsel may not reasonably rely on cross-examination if "affirmative" defense evidence may be produced. Indeed, in the Ninth Circuit's peculiar view—but not in any view expressed by this Court—defense counsel bears special *Strickland* obligations with respect to forensic-expert testimony. *Id.* at 111a ("The obligation to investigate only grows more imperative where the evidence at issue is the 'only forensic evidence' that could reasonably support the defense theory").

The court of appeals thus improperly enlarged counsel's duty to investigate to include consultation with and presentation of an expert in virtually every case in which the prosecution could conceivably offer relevant forensic evidence. While Sun Tzu's exhortation to be ready for "any contingency," much like the Boy Scouts' motto, "Always Be Prepared," might express a laudable goal, the demands of a criminal trial force counsel to marshal his or her resources in order to best respond to the evidence the prosecution has signaled it intends to present to prove the charges—not evidence the prosecution *might* present *if* it happens to develop at some point in time. This Court has never held, and thus the federal habeas court under § 2254(d) may not on its own establish, that defense counsel's failure to be prepared for "any contingency" constitutes deficient performance.

It is true that the Ninth Circuit purported to disclaim adoption of any per se rule about presenting available forensic or expert evidence. App. 116a (n. 12). But the disclaimer cannot be reconciled with the opinion. The Ninth Circuit similarly disclaimed adoption of a "nothing to lose" rule in *Mirzayance*. This Court, however, correctly discerned that, in substance, the Ninth Circuit had done precisely that. 129 S.Ct. at 1419 n. 3. It is the same here.

Ironically, the en banc majority's attempt to distinguish *Mirzayance* merely exposed the conflict. The en banc majority described *Mirzayance* as a case in which counsel reasonably investigated and decided not to pursue a hopeless defense. App. 116a. However, in this case, Richter's counsel also reasonably decided not to pursue an investigation that presented little prospect of a favorable result.

As graphically illustrated by its immediate appeal to Sun Tzu, rather than to *Strickland,* the en banc court's majority opinion apparently applied, in the guise of "clearly established Federal law," a novel rule requiring investigation of "any" conceivable line of defense despite counsel's reasonable professional judgment as to the necessity for such investigation so long as there was "no negative consequence" to the defense and regardless of whether it deprived counsel of time to check out more promising leads. The Ninth Circuit thus spawned a "hard edged rule" rather than looking at the case as if standing in counsel's shoes. Cf. *Rompilla* v. *Beard*, 545 U.S. at 381.

The Ninth Circuit's decision in this case suffers from the same kind of error that this Court was constrained to correct in *Wong* v. *Belmontes*, 130 S.Ct. 383 (2009) (per curiam). There, the Ninth Circuit determined that a reasonably competent defense lawyer would have introduced more mitigation evidence on top of what counsel had already presented and the additional evidence it proposed would have carried greater weight if counsel had submitted expert testimony. In reversing the Ninth Circuit, this Court explained that "the notion that the result could have been different if only [defense counsel] had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful." 130 S.Ct. at 391. As it was in *Belmontes*, the Ninth Circuit's infatuation with expert testimony is plainly wrong.

As the dissenting opinion cogently observed, "the majority's holding plainly enlarges the constitutional duty of defense counsel to seek out and present expert testimony." App. 139a. The dissent warned that:

> If counsel in this case can be said to have unreasonably rendered deficient performance in failing to use a serologist at trial, almost no counsel in the future can satisfy *Strickland* without first consulting with every conceivably relevant expert before trial and then calling these experts at trial to testify on any contested forensic issue.

App. 172a.

Consider, for example, cases where eyewitness identification testimony was involved. Under the Ninth Circuit's interpretation of the Sixth

Amendment, defense counsel would have to consult with and/or present an expert to address the various psychological and other factors bearing on the reliability of such testimony in order to be deemed "competent." Similarly, in any case in which the prosecution proposed to present evidence regarding sexual assault, defense counsel would be constrained to present an expert to challenge any forensic evidence presented by the prosecution—even if the defense were willing to concede that there had been sexual contact and the only contested issue was whether the contact was consensual.

The instant case underscores the difficulty in mandating, as a function of evaluating attorney competency, the use of experts irrespective of the availability of other means of challenging the prosecution's case. As the dissent noted:

> At best [Richter's habeas experts] can only challenge the [prosecutor's] conclusion that evidence shows conclusively that the swabbed sample contained Johnson's blood only—a conclusion that Richter's counsel effectively challenged at trial during cross-examination.

App. 163a.

Having established its own standard for attorney competency that elevates the importance of expert testimony, the Ninth Circuit then deemed Richter's counsel's failure to meet that standard prejudicial. App. 125a-131a. According to the en banc majority, "counsel's failure to present blood spatter expert testimony undermines our confidence in the result, and, accordingly, was prejudicial." *Id.* at 127a. The majority then found, with no further discussion, that the California Supreme Court's denial of Richter's ineffective-counsel claim "was an unreasonable application of *Strickland*. . . ." *Id.* at 132a.

The Ninth Circuit's finding of prejudicially-deficient performance is the inevitable result of its exalted view of expert opinion evidence. Thus, the majority asserts that "reasonable doubt in the minds of the jurors" would have been "reinforced had counsel offered expert testimony on blood typing to rebut that of the State's serology expert." App. 132a.

The court of appeals' prejudice analysis proceeds from the premise that the source of the blood pool was a "critical question" that the jury could not adequately resolve in the absence of expert evidence that contradicted the State's experts. However, this is a false premise as the source of the blood pool was, at best, only a peripheral issue. The Ninth Circuit's finding that the California Supreme Court unreasonably applied this Court's *Strickland* standard by not finding Richter's counsel's performance prejudicially-deficient is clearly untenable.

As we have shown, by employing its own novel expert-opinion rule—rather than this Court's "clearly established" *Strickland* standard—in evaluating Richter's ineffective-counsel claim, the Ninth Circuit improperly deviated from the protocol established by AEDPA for evaluating habeas corpus petitions presented pursuant to 28 U.S.C. § 2254. Had the Ninth Circuit faithfully adhered to this Court's general and highly deferential *Strickland* standard, it would have ruled as the district court and the three-judge panel had, that is, that Richter had failed to meet his burden of showing that he was denied effective representation at trial.

◆

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S
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In The
Supreme Court of the United States

◆

KELLY HARRINGTON,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

◆

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QUESTIONS PRESENTED

1) Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

2) Did trial counsel render ineffective assistance of counsel in failing to investigate or be prepared to use readily available forensic evidence directly supporting the theory of defense he himself selected, where that defense directly undercut the state's theory and where counsel promised the jury that defense in opening statements, called defendant to testify to support that defense and relied on that defense in closing argument?

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STATEMENT OF THE CASE

The Trial.

On the morning of December 20, 1994, a shooting occurred at 4620 Fair Oaks Boulevard in Sacramento, California. One person – Patrick Klein – was killed while another – Joshua Johnson – was injured. When police arrived, they found Klein lying on a sleeping bag on the living room couch and a large blood pool in the bedroom doorway.

Police photographed the blood pool but took no sample of the blood. Because the jury would hear two completely different explanations for the shooting – each of which depended on a different source for the blood pool – the blood pool itself played a critical role in the case.

The state charged respondent Joshua Richter and co-defendant Christian Branscombe with murder and attempted murder. As the district court noted, the parties presented "divergent theories" of the shooting. Pet. App. 27a.[1]

According to the state, defendants went to Fair Oaks Boulevard to commit a robbery, shot Klein as he slept on the couch and shot Johnson when he awoke.

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[1] "Pet. App." refers to the Appendix accompanying the state's Petition for Writ of Certiorari. "RT" and "CT" refer to the Reporter's and Clerk's Transcripts of the original trial, lodged in district court. "ER" refers to the Excerpt of Record filed in the Court of Appeals.

There were three components essential to the state's theory: (1) Klein was shot while sleeping on the couch, (2) the blood pool found in the bedroom doorway came from Johnson as he waited for police, and (3) Johnson did not initiate a gun battle by shooting at Branscombe. The state's case was based largely on Johnson's testimony.

At the time of the shooting, Johnson was a drug dealer, selling approximately one pound of marijuana a day, along with psilocybin mushrooms. RT 474, 480. Johnson owned numerous rifles, shotguns and handguns. RT 481-82. He testified for the state under a grant of immunity in connection with a series of charges pending against him, including cultivation of marijuana, conspiracy, using a minor to sell drugs, and possession of a firearm. RT 475-78.

Johnson first told the 911 operator there were four or five assailants. RT 577, 686-87. He then changed his story, saying there were three to four assailants. RT 577, 686-87. Still later, he told police there was one assailant. RT 946. Finally, Johnson said Richter and Branscombe shot Klein as he slept on the couch and then Johnson in the bedroom. RT 507, 510. Johnson never explained why he initially failed to identify the defendants, both of whom he knew well. Johnson admitted he had a .380 caliber gun that night by his bedside but testified he did not fire it. RT 511, 590.

In a detailed opening statement defense counsel outlined the very different defense theory. ER

129-48. According to counsel, defendants went to Fair Oaks Boulevard to return a gun Branscombe borrowed. Richter dropped Branscombe off and, moments later, heard shooting. Rushing into the house, Richter saw Klein on the floor in the bedroom doorway, while Branscombe yelled that Johnson tried to shoot him. There were three components essential to the defense theory: (1) Klein was *not* shot on the couch while sleeping but in the bedroom doorway during a gun battle, (2) the blood pool in the doorway was *not* from Johnson, but from Klein before Johnson carried him to the couch, and (3) Johnson fired a .380 caliber gun at Branscombe who returned fire in self-defense. The defense case was based largely on Richter's testimony. RT 1087-91.

Given these two inconsistent versions of events, the blood pool was a critical piece of evidence. The en banc court noted this precise point:

> If Klein was killed while lying on the couch in the living room, there was no possibility Richter's account was correct. If, in contrast, Klein was killed in the doorway to the bedroom, [the state's] account of the events in question could not possibly be true.

Pet. App. 125a.

This simple point was not lost on defense counsel; in fact, he recognized it from the beginning of the case. In opening statement, counsel promised jurors the physical evidence would show "Patrick Klein was not shot there on the couch;" he relied on the "pool[ ] of blood" that was "inconsistent with the stories told by Gunner Johnson." ER 134-35. He told jurors the blood pool was "evidence of great importance." ER 135. He promised "the evidence will show that . . . Johnson after Patrick was shot moved him to the couch" and explained "[t]he evidence will show you that in the bedroom there is a pool of blood right in the entrance [to the bedroom]. . . . There is also a trail of blood from there to the couch." ER 138, 142. During the defense case, he called Richter to testify that he saw Klein lying in the bedroom doorway. RT 1090. And in closing argument, defense counsel argued the same theory: the blood pool proved Johnson was lying and Klein was shot in the doorway during the crossfire after Johnson fired at Branscombe. RT 1510-12.

It should have been easy to decide who deposited the blood by testing a sample from the pool. Yet although police noted the "fair amount of blood" in the pool, they never collected any of it. RT 937. Thus, the genetic source of that blood could not be established by scientific tests. RT 937.

The state did call a blood spatter expert, detective Bob Bell. Bell defined "high-velocity blood spatter" as a blood stain from "a force similar to a gunshot or similar type force applied to the blood source" resulting in "atomized blood" similar "to a can of aerosol spray in that it's minute" with "fan-like distribution." RT 140, 148. Bell conceded there was no high-velocity blood spatter on (1) the wall immediately behind the couch, (2) the sleeping bag or (3) the couch where Klein was found. RT 162, 183-84, 230, 237.

Because of the complete absence of such blood spatter in the most probative locations, the prosecutor asked Bell if he saw "any spatter . . . consistent with Patrick Klein having been shot on the couch." RT 148. Bell responded "[n]ot much, but there was some" and went on to identify several drops of blood which "may" have been caused by Klein being shot on the couch. RT 148, 150. These drops were on a Ziploc bag and a piece of paper, both on the ground between the couch arm and a chair. RT 149. Branscombe's counsel later described this spatter as "two tiny drops of blood." RT 149, 152, 1585. Despite the absence of high-velocity blood on the wall, couch or sleeping bag, the prosecutor nevertheless argued Klein was shot on the couch and the blood pool in the bedroom doorway was deposited by Johnson dripping blood as he waited for police. ER 178.[2]

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[2] Without citing the record, the state now claims there was "evidence of high-velocity blood spatter on the wall by the couch where Klein was found." Petitioner's Brief ("PB") 19. *Accord* PB 48. The state goes further, describing this as "the most significant evidence proving Richter's guilt" which is "irrefutabl[e]." PB 19.

The state's claim is unsupportable. Not only did Bell himself concede there was no high-velocity blood spatter on the couch or sleeping bag, but he went further and admitted there was none on the wall either. RT 162, 183-84, 230, 237. And during closing arguments, the prosecutor and both defense lawyers all recognized there was no blood on the wall. *See* RT 1457-58, 1585, 1612.

Although defense counsel recognized the importance of the blood pool evidence in opening statements, called his client to support the theory that Klein was the source of the pool, and relied on that theory in closing argument, he neither consulted with nor called a blood spatter expert. He just argued the theory in closing, without support. In his own closing argument, the prosecutor made this exact point, noting that counsel had introduced no expert testimony to support his theory that the blood pool proved Klein was shot in the bedroom doorway:

> Bob Bell, he's 22 years as a blood spatter expert, all that stuff means nothing. He [defense counsel] says, the blood be here. Bob Bell, he's wrong, trust me. I am not going to go get an expert. I am not going to bring some-body in here to tell you because I don't need to do it. I will just do it in closing argument. I will just say it. If you are willing to believe me, hey, that will work.

RT 1607.

Even on this record, the jury obviously viewed the case as close. Although the state presented Johnson's eyewitness testimony identifying defendants, the jury deliberated more than 14 hours over three days, twice returning with requests to have testimony re-read. CT 310-18.

The New Evidence.

In state habeas proceedings initiated after his conviction, Richter presented expert testimony showing that Johnson could not have been the source of the blood pool. The explanation is both logical and simple.

According to blood spatter expert Ken Moses, a standing person dripping blood into blood (as the trial prosecutor theorized) would create a large number of round splash drops – known as satellite drops – surrounding the main pool of blood. ER 82-83. The lack of satellite drops here shows the state's theory as to the source of the blood pool – that it was from Johnson as he stood in the doorway dripping into the blood pool – was false. ER 82-83. To the contrary, the absence of satellite drops establishes the blood pool was caused *not* by drops falling from an injured person standing in the doorway, but by the pooling of blood from a source close to or on the floor. ER 82-83. Moses's conclusion was straightforward:

> The lack of a large number of satellite dropletts [sic] surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing in[ ] the doorway dripping into the pool below.

In district court, there was no dispute whether there were satellite drops surrounding the blood pool. The photograph of the blood pool shows there were none, and the state itself conceded this point below. J.A. 110, 143 ("The evidence of record discloses that no 'satellite drops' were observed by the crime scene investigators."). Thus, the state neither cross-examined Moses nor offered any contrary testimony, instead stipulating to admission of Moses's unrebutted expert testimony. ER 399.

The district court itself noted that defense counsel could have presented expert testimony showing "the pool of blood . . . could not have been made by someone standing and dripping blood." Pet. App. 39a. But because defense counsel did not consult a blood spatter expert, the jury deciding Richter's fate never knew this.

State Court Proceedings.

Based on this new evidence, Richter sought collateral relief in state court, contending counsel violated *Strickland* in failing to investigate and present forensic evidence supporting the theory counsel himself elected to present. Richter presented his *Strickland* claim, as well as several other claims, directly to the state supreme court in an eight-claim habeas petition and asked for discovery and an evidentiary hearing. J.A. 8-31.

The state supreme court requested informal opposition from the state. The Attorney General did not respond at all to two of Richter's claims. *In re*

Richter, S082167, Informal Response at 1-93.[3] As to the remaining six claims, the state argued: (1) four of the six were untimely, (2) a fifth should have been raised on appeal and (3) all six were without merit. *Id.* at 24-92. On March 28, 2001, the state court denied the petition without discovery or a hearing in a one-line order:

> Petition for writ of habeas corpus is DENIED. J.A. 129.

Defense Counsel's Explanation.

Richter then sought habeas relief in federal court. The district court ordered a deposition of trial counsel. The parties jointly submitted the deposition in lieu of live testimony. ER 399.

In light of the theory he elected to present, Richter's trial counsel recognized "[i]t was significant to try to show that [the blood pool] was at least partially the other gentleman's blood, meaning Klein's blood." ER 283. Had Klein's blood been in the doorway, "[i]t would have gone a long way to impeach the testimony of Mr. Johnson" and would have corroborated Richter's testimony. ER 283-84. But counsel did not consult a blood spatter expert before or during trial. ER 245. Counsel admitted there was no tactical reason for his failure: he simply did not consider a blood spatter expert. ER 289-90.

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[3] The parties have jointly asked to lodge the state's informal response with the Court. That request is pending.

Federal Court Proceedings.

The district court found that counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case" between Johnson and Richter. Pet. App. 39a. The court relied on this fact to find reasonable counsel's complete failure to investigate forensic testimony directly supporting Richter's theory. *Ibid.* As a consequence, the court did not address the prejudice component of this issue. Pet. App. 44a.

A three-judge panel affirmed. Although "[c]ounsel highly experienced in trying capital cases involving bloodstain evidence might well have understood the value of such an expert," the "Sixth Amendment does not guarantee defendants a right to highly experienced counsel." Pet. App. 73a. Accordingly, counsel's failure to investigate or present evidence proving the very theory he himself relied on throughout his case was reasonable. Like the district court, the panel never addressed prejudice. Pet. App. 73a.

A 7-4 en banc panel disagreed, ruling that defense counsel unreasonably failed to even consider expert testimony to "support the theory he had chosen." Pet. App. 103a-105a and n.6. In accord with cases from throughout the country, the majority squarely rejected the district court's view that the failure to investigate the defense theory was rendered reasonable "because counsel thought that the case was, at bottom, a credibility contest." *Id.* at 113a. Accurately noting that counsel himself offered no strategic reason for failing to consult with a blood spatter expert, the court refused to invent such a reason for him. *Id.* at 115a.

The en banc court then turned to prejudice, recognizing that absent Moses's testimony, "the only expert explanation of the evidence that the jury heard was consistent with the prosecution's version." Pet. App. 126a. Had defense counsel done his job, however, the jury would have heard testimony from "an experienced former law enforcement officer" that "directly contradicted the prosecution's version and raised substantial doubt" as to Johnson's testimony on "a central point." *Id.* at 126a-127a. Moreover, because the state had neither cross-examined Moses nor presented any contrary evidence, Moses's conclusion "remains undisputed." *Id.* at 126a. Noting Johnson's shifting versions of events given to police, *id.* at 128a, the court concluded counsel's failure to investigate the blood spatter evidence was prejudicial.

SUMMARY OF ARGUMENT

Richter presented the state court with an eight-claim habeas petition including his *Strickland* claim. The state court summarily denied this petition in an eight-word ruling:

> Petition for Writ of Habeas Corpus is DENIED.

In accord with circuit precedent, both the three-judge and the en banc panels applied the deference provisions of AEDPA – set forth in 28 U.S.C. § 2254(d) – to Richter's *Strickland* claim. Pet. App. 64a, 101a, 120a, 135a-136a.

The first question presented is whether § 2254(d) applies to a state court's summary disposition of a federal claim. By its own terms, § 2254(d) deference applies only to claims that have been "adjudicated on the merits" in state court proceedings. For some time now the question whether § 2254(d) applies to a summary disposition has generated a variety of views in the lower courts. *See*, *e.g.*, *Washington v. Schriver*, 255 F.3d 45, 53-54 (2nd Cir. 2001) (discussing disparate views). However, because of a peculiar feature of California law – which employs four distinct types of summary dispositions in non-capital habeas cases – that general question is not at issue here.

Whatever the treatment of summary dispositions in other states, or indeed the treatment of other summary dispositions from the California Supreme Court, the particular summary denial relied on by the state court here – known as a "silent denial" – is unique among the state court's summary orders. Under state law, a silent denial is used when a majority of the state court has not agreed whether the reasons for denying a petition are merits-based or procedural, and therefore does not constitute an "adjudication on the merits" within the meaning of § 2254(d).

This Court has already interpreted California's silent denial in light of state law. *See Ylst v. Nunnemaker*, 501 U.S. 797 (1992). In *Ylst*, California itself contended that under state law, a silent denial did *not* constitute an adjudication on the merits. This Court agreed. Thus, under established California practice and this Court's precedent – and in accord with the state's own position on this very issue for years – the silent denial employed here was not an adjudication on the merits. Where, as here, a state court uses a summary disposition that does not reflect an adjudication on the merits, § 2254(d) does not apply.

Even if the silent denial used here were on the merits, § 2254(d) would not apply to the *Strickland* claim on this record. *Strickland* claims have two prongs: deficient performance and prejudice. In a line of cases from *Wiggins v. Smith*, 539 U.S. 510 (2003) through *Porter v. McCollum*, ___ U.S. ___, 130 S.Ct. 447 (2009) the Court has held that in cases raising *Strickland* claims, § 2254(d) applies only to those prongs actually adjudicated on the merits. Here, the state not only assumes a merits adjudication in the first instance, but it urges the Court to presume the state court resolved both prejudice and performance prongs and accord § 2254(d) deference to both presumed resolutions. This presumption as to the applicability of § 2254(d) should be rejected; it constitutes an end run around the state's burden to prove an adjudication on the merits and is inconsistent with how courts generally resolve *Strickland* claims.

But even if the silent denial here were on the merits, and even if the Court presumed the state court resolved the merits of both components of the *Strickland* test, § 2254(d) would still not apply. In 28 U.S.C. §§ 2254(d)(1) and (2), Congress provided a mechanism for habeas petitioners to prove that § 2254(d) deference does not apply. Both (d)(1) and (2) require petitioners to analyze the reasoning used by the state court. Applying § 2254(d) to unreasoned summary dispositions – even if they are on the merits – is not only inconsistent with Congress's provision of §§ 2254(d)(1) and (2), but provides a strong incentive for state courts to say nothing at all when resolving a federal constitutional claim, and thereby avoid any genuine scrutiny by federal courts. Congress could not have intended such a consequence.

Turning to the merits, the en banc court's conclusion that trial counsel unreasonably failed to investigate his own theory of defense was entirely correct. If the jury here believed Johnson, it would convict of murder. If it believed Richter, it would acquit. The jury thus had to decide one simple question: who was telling the truth?

As the majority noted, if Klein was shot on the couch (as Johnson testified), Richter was lying. But if Klein was shot in the bedroom (as Richter testified), Johnson was lying. The source of the blood pool would tell the real story.

Defense counsel told the jury in opening statements the blood pool was critical, and he called Richter to testify that Klein was lying in the bedroom doorway where the blood pool was found. In closing argument, and without supporting evidence, defense counsel argued that the blood pool proved Johnson was lying and Klein was not shot on the couch. But counsel utterly failed to investigate now-undisputed forensic evidence which would have proven just that. And when asked to explain his failure, he forthrightly conceded he had no tactical reason at all; he simply did not consider such an investigation. Counsel's failure to investigate the defense he himself selected and relied on throughout trial was unreasonable.

It was also prejudicial. The only theory of the case supported by expert testimony was the state's theory. Even so, the jury deliberations were protracted, suggesting a close case. If accepted, Moses's testimony refutes the state's explanation for the blood pool, supports Richter's own testimony and impeaches Johnson's testimony regarding the circumstances of Klein's death. The absence of credible forensic evidence directly supporting the otherwise unsubstantiated defense theory, and just as directly undercutting the state's theory, plainly undermines confidence in the outcome of trial.

◆

ARGUMENT

I. BECAUSE OF THE NATURE OF THE PARTICULAR SUMMARY DISPOSITION USED IN THIS CASE, SECTION 2254(d) DOES NOT APPLY.

As enacted in 1948, 28 U.S.C. § 2254(a) permits federal courts to grant habeas relief to "person[s] in custody pursuant to the judgment of a State court" where that custody is "in violation of the Constitution or laws or treaties of the United States." *See also* 28 U.S.C. §§ 2241(a), (c)(3). 28 U.S.C. § 2254(d) – enacted in 1996 – precludes federal courts from granting habeas relief as to all claims that have been "adjudicated on the merits" in state court, subject to the criteria set forth in §§ 2254(d)(1) and (2).

Here, Richter presented his *Strickland* claim as the second claim of an eight-claim state petition. J.A. 15-19. The state court summarily denied this petition, ruling "Petition for Writ of Habeas Corpus is DENIED." J.A. 129.

The state argues § 2254(d) applies to this summary ruling. The state is wrong for three separate reasons. First, the silent denial used by the state court here was not an adjudication on the merits within the meaning of § 2254(d). Second, § 2254(d) does not apply because there is no indication in the record which prong of the *Strickland* test the state court adjudicated. Finally, the absence of any reasoning in the summary disposition precludes application of § 2254(d).

A. California Law Has Four General Types Of Summary Denials; Because California Law Recognizes That The Particular Denial Used Here Is Not An Adjudication On The Merits, § 2254(d) Does Not Apply To This Case.

The state first argues that the silent denial issued in this case constitutes an "adjudication on the merits" of the ineffective assistance claim and is therefore entitled to deference under § 2254(d). PB 22-24. The state's thesis has two premises.

First, this Court must examine state law to determine whether a summary ruling is an adjudication on the merits for purposes of § 2254(d). PB 22. Second, "[u]nder California law, this summary denial constituted a merits determination. . . ." PB 22.

The state's first premise is entirely correct. Given the comity interests on which § 2254(d) was based, determining whether the silent denial used here was an adjudication on the merits requires resort to state law. As the state itself has long contended, "the significance of a silent order must be determined by reference to the law of the state." Brief for Petitioner, *Ylst*, 501 U.S. 797 (No. 90-68), 1990 WL 505547 at *6.

But the state's second premise – contained in a single sentence in its brief – ignores state law almost entirely. In fact, the California Supreme Court has developed four distinct summary orders in connection with non-capital state habeas cases, each reflecting a different resolution of the case. Because the silent denial used here does not reflect an adjudication on the merits, § 2254(d) does not apply to this case.

Since the parties agree that principles of comity require examination of California law to determine, at least in the first instance, whether the silent denial used here is an "adjudication on the merits," the analysis must begin with California practice. Both the California scheme and the four types of summary orders are discussed below. But one point is clear from a review of the state supreme court's practice: the state court's selection of a particular summary order is not a haphazard circumstance to be ignored but a considered judgment which must be respected. The summary order used here – a silent denial – was not an adjudication on the merits.

1. California's state habeas system.

In California, prisoners may collaterally challenge their convictions by filing a petition for writ of habeas corpus. *People v. Romero*, 8 Cal. 4th 728, 737 (1994). The California Constitution grants original jurisdiction in habeas proceedings to "[t]he Supreme Court, courts of appeal, superior courts, and their judges." Cal. Const., art. VI, § 10.

This original jurisdiction feature of California law has several consequences. First, where a California petitioner has sought and been denied habeas relief in the state superior or appellate court without issuance of an order to show cause, he may seek review by filing an original habeas petition in a higher state court (as opposed to filing an appeal). *Evans v. Chavis*, 546 U.S. 189, 192-93 (2006). Second, and as Richter did here, a California petitioner may file his initial habeas petition directly with the state supreme court. *See, e.g.*, *In re Harris*, 49 Cal. 3d 131, 134 (1989).

When a habeas petition has been filed with the state supreme court, that court has two options. First, the court may require full briefing by issuing an order to "show cause why the relief sought should not be granted." *Romero*, 8 Cal. 4th at 738. After briefing the state court can grant relief, deny relief or order an evidentiary hearing. *Id.* at 739-40. The issuance of an order to show cause creates a "cause" and triggers "the state constitutional requirement that the cause be resolved 'in writing with reasons stated.'" *Romero*, 8 Cal. 4th at 740.

Alternatively, "[i]f the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred, the court will deny the petition outright, such dispositions being commonly referred to as 'summary denials.'" *Romero*, 8 Cal. 4th at 737. A summary denial is proper under state law because, absent an order to show cause, the matter is not a "cause" and the constitutional requirement of a written decision "with reasons stated" does not apply. *Id.* at 740.

2. The silent denial issued here is not an adjudication on the merits.

The California Supreme Court has seven justices. "The concurrence of at least four justices is needed for a decision to review a case or take other action." Supreme Court of California, Internal Operating Practices and Procedures at 20 (2007). As discussed above, when faced with an original habeas petition, a majority of the court may rule that a summary denial is appropriate without issuing an order to show cause.

Under California law, there are four general categories of summary denials. First, the state court may summarily deny a petition where the claims of the petition simply have no merit. *See*, *e.g.*, *People v. Wingo*, 14 Cal. 3d 169, 183 (1975). As the state supreme court has explained, when it specifically uses the phrase "on the merits" in summarily denying a petition or claim, the court has considered the merits. *In re Robbins*, 18 Cal. 4th 770, 814, n.34 (1998). For years, both before and after the 2001 order issued in this case, the state supreme court has summarily denied petitions "on the merits" when a decision on the merits has actually been reached. *See*, *e.g.*, *In re Garcia*, No. S081738, 1999 Cal. LEXIS 8884 (Cal. Dec. 21, 1999) ("Petition for writ of habeas corpus is DENIED on the merits."); *In re Lateef*, No. S083668, 2000 Cal. LEXIS 9069 (Cal. Nov. 29, 2000) (same); *In re Askins*, No. S103529, 2002 Cal. LEXIS 6000 (Cal. Aug. 28, 2002) (same); *In re Gomez*, No. S114736, 2003 Cal. LEXIS 10233 (Cal. Dec. 23, 2003) (same).

Second, the state court may reject a habeas petition for procedural reasons, without considering the merits. *Robbins*, 18 Cal. 4th at 778, n.1. Under state law, summary denial is appropriate for a variety of procedural reasons, so long as at least four justices agree. *See*, *e.g.*, *id.* at 822 (barring claims as untimely based on views of four justices); *In re Gallego* 18 Cal. 4th 825, 856 (1998) (barring claims as untimely based on views of five justices). The state supreme court has explained that it will impose these procedural bars when they are applicable and no exception applies. *See Robbins*, 18 Cal. 4th at 814, n.34 (discussing bars of failing to raise a claim on appeal and timeliness). When a decision has been reached to deny a petition for procedural reasons, the state supreme court issues a summary order containing specific citations to state case law identifying the procedural flaw. *See*, *e.g.*, *In re Martinez*, No. S081606, 1999 Cal. LEXIS 8877 (Cal. Dec. 21, 1999) (citing *In re Clark*, 5 Cal. 4th 750 (Cal. 1965)); *In re Moon*, No. S090390, 2000 Cal. LEXIS 9666 (Cal. Dec. 20, 2000) (same); *In re Walker*, No. S108706, 2002 Cal. LEXIS 8636 (Cal. Dec. 18, 2002) (same); *In re Bowman*, No. S115258, 2003 Cal. LEXIS 10220 (Cal. Dec. 23, 2003) (same).[4]

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[4] California law contains numerous procedural reasons which could form the basis for a summary denial. For example, summary denial is proper where at least four justices agree a petitioner has (1) delayed too long in filing the petition (*In re Streeter*, 66 Cal. 2d 47, 52 (1967)); (2) failed to first file the petition in a lower court (*In re Steele*, 32 Cal. 4th 682, 692 (2004)); (3) presented claims which should have been raised on

(Continued on following page)

Third, the state court may summarily deny a petition for a combination of both merits and procedural reasons. Thus, summary denial is proper where a habeas petition (or a particular claim) is both procedurally flawed and without merit, again so long as at least four justices agree on both grounds. *See, e.g.*, *Robbins*, 18 Cal. 4th at 822 (barring claims as untimely and meritless based on views of four justices). As the state court has again explained, where it denies a petition or claim both "on the merits" and for a procedural reason, it has addressed both the merits and the procedural default. *See id.* at 814, n.34. When a decision has been reached to deny a petition for both procedural and merits-based reasons, the state supreme court issues a summary order referencing both the merits and case law identifying a procedural flaw. *See, e.g.*, *In re Bennett*, No. S080389, 1999 Cal. LEXIS 8179 (Cal. Nov. 23, 1999) (denying petition on the merits and for lack of diligence); *In re Ali*, No. S085472, 2000 Cal. LEXIS 9656 (Cal. Dec. 20, 2000) (same); *In re Jost*, No. S107124, 2002 Cal. LEXIS 8114 (Cal. Nov. 26, 2002) (same); *In re Karcher*, No. S114996, 2003 Cal. LEXIS 9413 (Cal. Nov. 25, 2003) (same).

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appeal (*In re Dixon*, 41 Cal. 2d 756, 759 (1953)); (4) presented factual allegations which are too vague (*In re Swain*, 34 Cal. 2d 300, 303-04 (1949); (5) presented claims not cognizable in state habeas proceedings (*In re Shipp*, 62 Cal. 2d 547, 550 (1965); or (6) presented claims raised and rejected in prior appellate or habeas proceedings. *In re Waltreus*, 62 Cal. 2d 218, 225 (1965); *In re Horowitz*, 33 Cal. 2d 534, 546 (1949).

But these three categories do not cover the entire range of possibilities. There are cases where at least four justices agree the petition should be denied but have not agreed whether it should be denied on the merits or for a procedural reason. In this situation, the state court issues a silent denial, an order that denies the petition but contains no reference to the merits, no reference to any procedural default, and no reference to a combination of the two. *See, e.g.*, *In re Garamallo*, No. S082961, 1999 Cal. LEXIS 9046 (Cal. Dec. 21, 1999) ("Petition for writ of habeas corpus is DENIED.") *In re Rodriguez*, No. S089952, 2000 Cal. LEXIS 8076 (Cal. Oct. 18, 2000) (same); *In re Griego*, No. S111208, 2002 Cal. LEXIS 8572 (Cal. Dec. 11, 2002) (same); *In re Golin*, No. S120778, 2003 Cal. LEXIS 10192 (Cal. Dec. 23, 2003) (same).

This Court has specifically addressed the meaning of California's "silent denial" on two occasions. In *Ylst*, 501 U.S. 797, this Court first addressed whether a silent denial constituted a "decision on the merits." *Id.* at 801. There, defendant was convicted of murder. On appeal, he argued the admission of certain evidence violated the Constitution. The state appellate court procedurally barred the claim because there was no trial objection. Defendant filed a number of habeas petitions in state court, including two in the state supreme court, raising this issue; the state court denied his second petition with a silent denial that read "Petition for writ of habeas corpus is denied." *Ylst v. Nunnemaker*, 90-68, J.A. at 114. The district court held defendant's claim defaulted. On appeal, the Ninth Circuit held the silent denial was a ruling on the merits which excused the default. *Nunnemaker v. Ylst*, 904 F.2d 473, 476 (9th Cir. 1990). Certiorari was granted.

The Court first noted the question was "whether the California Supreme Court's unexplained order denying [petitioner's] second habeas petition to that court . . . constituted a 'decision on the merits' of that claim sufficient to lift the procedural bar imposed in direct appeal." *Ylst*, 501 U.S. at 801. The question was "not an easy one." *Id.* at 802. This was so, the Court explained, because "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." *Id.* at 803. The Court recognized that "many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial." *Id.* (emphasis in original). As to the silent denial presented in *Ylst*, the Court concluded "it said absolutely nothing about the reasons for the denial." *Id.* at 805. *See also Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J., respecting denial of certiorari) ("A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result.")

Ultimately, this Court reversed the Ninth Circuit's ruling that a silent denial constituted a merits ruling, holding that a summary denial by a state court as to a federal claim which follows a reasoned decision by a state court rejecting that same claim is presumed to rest on the same ground. *Ylst*, 501 U.S. at 803. Although the *Ylst* presumption itself has no bearing here – because the only state decision on Richter's *Strickland* claim was the state supreme court's silent denial – the Court's observation about the nature of California's silent denial was entirely correct. Given the state court's clear practice of using different summary orders to reflect different dispositions, "the basis of [the summary denial at issue here] is not merely undiscoverable but nonexistent." *Ylst*, 501 U.S. at 803. "Attributing a reason is therefore both difficult and artificial." *Id.* In light of state practice, *Ylst* correctly concluded that a silent denial says "nothing about the reasons for the denial." *Id.* at 805.

The state supreme court's actual practice since *Ylst* shows there is nothing random about the distinct types of summary orders used by that court. Indeed, this Court need look no further than the state court's habeas orders of March 28, 2001 – the very same day the state court denied the petition in this case – to see that the different orders used by the state supreme court reflect a different decision-making process in each case. As noted above, on that day the state court entered an order in Richter's case that, in its entirety, said "Petition for writ of habeas corpus is DENIED." That same day, however, the state supreme court:

- Denied at least five non-capital habeas petitions with orders explicitly stating the denials were "on the merits." *See, e.g.*, *In re Waterbury*, No. S092905, 2001 Cal. LEXIS 2029 (Cal. Mar. 28, 2001) ("Petition for writ of habeas corpus DENIED on the merits."); *In re Miller*, No. S093294, 2001 Cal. LEXIS 2115 (Cal. Mar. 28, 2001) (same); *In re Reeves*, No. S093340, 2001 Cal. LEXIS 2123 (Cal. Mar. 28, 2001) (same); *In re Hunter*, No. S093724, 2001 Cal. LEXIS 2163 (Cal. Mar. 28, 2001) (same); *In re Smith*, No. S093921, 2001 Cal. LEXIS 2178 (Cal. Mar. 28, 2001) (same).

- Denied at least five non-capital habeas petitions solely on procedural grounds, with orders explicitly stating the denials were based on certain procedural grounds. *See, e.g.*, *In re Pham*, No. S092745, 2001 Cal. LEXIS 2000 (Cal. Mar. 28, 2001) ("Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal. 2d 218.)"); *In re Cubie*, No. S093034, 2001 Cal. LEXIS 2060 (Cal. Mar. 28, 2001) (same); *In re Flowers*, No. S093107, 2001 Cal. LEXIS 2079 (Cal. Mar. 28, 2001) (same); *In re Olson*, No. S093157, 2001 Cal. LEXIS 2090 (Cal. Mar. 28, 2001) (same); *In re Sistrunk*, No. S093548, 2001 Cal. LEXIS 2141 (Cal. Mar. 28, 2001) (same).

- Denied at least five petitions other than Richter's without referencing either the merits or any procedural defaults. *See, e.g.*, *In re Espinosa*, No. S092331, 2001

> Cal. LEXIS 1970 (Cal. Mar. 28, 2001) ("Petition for writ of habeas corpus is denied."); *In re Anton*, No. S092741, 2001 Cal. LEXIS 1999 (Cal. Mar. 28, 2001) (same); *In re Harris*, No. S093014, 2001 Cal. LEXIS 2055 (Cal. Mar. 28, 2001) (same); *In re Machado*, No. S093119, 2001 Cal. LEXIS 2083 (Cal. Mar. 28, 2001) (same); *In re Alford*, No. S093165, 2001 Cal. LEXIS 2093 (Cal. Mar. 28, 2001) (same).

As the state supreme court's actual practice shows, this Court's observations in *Ylst* about the meaning of a silent denial were entirely correct. On March 28, 2001, when the state court rejected a petition on the merits, it did so by explicitly adding the phrase "on the merits" to the summary order. When the state court rejected a petition for procedural reasons, it did so explicitly by adding a specific citation to procedural default case. And when the state court had not agreed on a rationale, it neither referenced the merits nor cited a procedural default case, instead issuing a silent denial. *Ylst* was right; because the members of the state court may not agree on a rationale when a silent denial is issued, it is impossible to determine the basis for that denial. *Ylst*, 501 U.S. at 803.

This Court reached the same result in *Evans v. Chavis*. There, defendant filed a habeas writ in the state supreme court more than three years after his writ in the state appellate court was denied. The state supreme court issued a silent denial. *Chavis*, 546 U.S. at 195. The Ninth Circuit held that because this silent denial did not dismiss the petition as untimely, the state court necessarily found the petition timely and reached "a decision on the merits." *Chavis v. LeMarque*, 382 F.3d 921, 926 (9th Cir. 2004). Thus, the panel held that the three-year period between levels of the state system tolled the one-year time frame within which defendant had to file in federal court pursuant to 28 U.S.C. § 2244(d)(2). *Id.*

In its briefing to this Court, California recognized that under state law, determining what this particular summary order meant was impossible because the seven members of the state court may "not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." Brief for Petitioner, *Chavis*, 546 U.S. 189 (No. 04-721), 2005 WL 2841657 at *24. The state urged this Court to reject the Ninth Circuit's conclusion that the silent denial was on the merits precisely because "[t]he essence of unexplained orders is that they say nothing." *Id.* at *25. This Court agreed, ruling that it was impossible to determine from the silent denial whether the state court denied the state petition (1) by rejecting the claims on the merits or (2) because it was untimely. *Chavis*, 546 U.S. at 197-98.

The same conclusion applies here. As noted, Richter filed an eight-claim petition with the state supreme court. In response, the state filed a brief arguing (1) four of the eight claims were untimely, (2) one claim should have been raised on appeal and (3) six claims were meritless. The state court issued a silent denial. On this record, as this Court concluded in *Ylst*, attributing a reason for this denial is "both difficult and artificial." *Ylst*, 501 U.S. at 803.

Indeed, there should be little dispute that not only is it impossible to determine the basis for a silent denial, but a silent denial is not on the merits. Even prior to *Chavis*, the state conceded this very point. Brief for Petitioner, *Ylst*, 501 U.S. 797 (No. 90-68), 1990 WL 505547 at *30 (silent denial by state supreme court is not "a determination of a 'cause' within the meaning of the state constitution," "does not establish the law of the case" and "is not a judgment which conclusively and definitively establishes the rights and obligations of the parties"); Closing Brief for Petitioner, *Ylst*, 501 U.S. 797 (No. 90-68), 1991 WL 11007944 at *21 (the state court's "silent denial . . . of habeas corpus relief" is "not necessarily a decision on the merits."); *id*. at *25 ("Certainly [the state supreme court's] denials are not intended as conclusions on the merits.").

In now arguing a silent denial is actually a decision on the merits, the state ignores (1) the four distinct types of summary orders used in non-capital habeas cases, (2) its prior explicit position that a silent denial is "not intended as [a] conclusion[] on the merits" and (3) this Court's decisions in *Ylst* and *Chavis*. PB 22-24. The state does not explain whether its new position requires reconsideration of either *Chavis* or *Ylst*. *See Ylst*, 501 U.S. at 806-07 (White, J., concurring) (noting that if "as a matter of state law . . . [a silent denial] is a ruling on the merits, the presumption the Court's opinion articulates would be rebutted. . . ."). Nor does the state explain how it is that a silent denial (1) is *not* an adjudication on the merits which federal courts must honor when assessing a lower state court's procedural default (the holding in *Ylst*) but (2) *is* an adjudication on the merits which federal courts must honor when assessing § 2254(d).[5]

The Court need not linger over these obvious tensions. In arguing that a silent denial is a merits determination, the state cites four state cases. PB 22, citing *Robbins*, 18 Cal. 4th 770, *People v. Duvall*, 9 Cal. 4th 464 (1995), *Romero*, 8 Cal. 4th 728, and *In re Clark*, 5 Cal. 4th 750 (1993). Not only will these four cases not support the state's newly-minted position, but when taken together they establish that a silent denial is not a merits determination.

Neither *Duvall*, *Romero* nor *Clark* discussed (or even involved) silent denials. Instead, in generally discussing state habeas practice, they simply reaffirmed longstanding state law that where there is no prima facie case, a summary disposition on the merits is warranted. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 737; *Clark*, 5 Cal. 4th at 770. *Robbins* adds that the state court will "deny a claim 'on the merits' when we conclude that no prima facie case for relief is stated . . . ." *Robbins*, 18 Cal. 4th at 814, n.34. Taken together these four cases show (1) where the state court finds no prima facie case, that is a decision on the merits for which a summary disposition is proper and (2) when the state court uses the phrase "on the merits" in its summary orders, it has considered and rejected the merits. Nothing in these cases supports the counter-intuitive proposition that a silent denial means the same thing as an explicit denial "on the merits."[6]

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[5] The breadth of the state's change in positions is noteworthy. Here, the state argues a silent denial is a merits adjudication precisely because it "settle[s] finally [ ] the rights and duties of the parties. . . ." PB 25. But in *Ylst*, the state argued a silent denial was *not* a merits adjudication because it was "not a judgment which conclusively and definitively establishes the rights and obligations of the parties." Brief for Petitioner, *Ylst*, 501 U.S. 797 (No. 90-68), 1990 WL 505547 at *30.

As a consequence, the state court's practice of denying certain cases "on the merits," others for procedural reasons and still others with silent denials is not simply a haphazard factor to be ignored. The state court's practice – both over the course of many years and on the very day the order in this case was issued – shows that the choice of summary dispositions is a considered judgment entitled to respect. As this Court held in *Ylst* and *Chavis*, as the state has consistently conceded (until now) and as state practice shows, the silent denial involved here was not an adjudication on the merits.

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[6] One of the state's amici cites *Robbins*'s footnote 34 for the proposition that "the California Supreme Court has told us unambiguously that when it sustains a timeliness objection by the State it says so." Amicus Brief of Criminal Justice Legal Foundation ("CJLF") at 11, citing *Robbins*, 18 Cal. 4th at 815, n.34. Because the silent denial here did not reference timeliness, CJLF argues "the context of the summary denial makes it unambiguously on the merits."

CJLF tells only half the story. In footnote 34, the state court also confirmed that when it rejects the merits of a claim, it explicitly "den[ies] [the] claim 'on the merits'." In light of *Robbins*, where a silent denial references neither "the merits" nor a default, this means there simply was no majority for either position. That ambiguity was, of course, exactly the point this Court made in *Ylst*.

In this respect, the summary denial used here is not unique to California. Indeed, Texas has filed an amicus brief here noting that Texas courts also have a choice among summary dispositions, only one of which is a merits adjudication under state law. Amicus Brief of Texas ("TB") at 14, n.1. Texas recognizes § 2254(d) does not apply where a particular summary disposition "show[s] that the state court has not adjudicated the merits . . . ." *Id.*

Texas is right. Under the plain language of § 2254(d), where a state court does *not* adjudicate the merits of a defendant's claim, federal review is unconstrained by § 2254(d). *Porter*, 130 S.Ct. at 452; *Wiggins*, 539 U.S. at 534. Since the silent denial here was not an adjudication on the merits, § 2254(d) does not apply.[7]

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[7] Notwithstanding the inapplicability of § 2254(d) to the silent denial in this case, § 2254(d) nevertheless applies to the great majority of non-capital California habeas petitioners, even those involving a silent denial. In connection with non-capital cases, California court rules not only require petitioners to plead whether they filed a habeas petition below and explain any failure to do so, but reviewing courts may deny habeas petitions not filed first in a lower court. California Rules of Court 8.380(a), 8.384(a)(1), 8.384(b)(1); California Form MC-275, Petition for Writ of Habeas Corpus at p. 6, q. 18; *Steele*, 32 Cal.4th at 692. As this Court has concluded, "California's habeas rules lead a prisoner ordinarily to file a petition in a lower court first." *Carey v. Saffold*, 536 U.S. 214, 221 (2002). And when a California trial court denies a petition, it must issue a written order "contain[ing] a brief statement of the reasons for the denial. An order only declaring the petition to be 'denied' is insufficient." California Rule of Court 4.551(g). Because *Ylst* requires federal courts to look through silent denials to lower court adjudications – and because California petitioners "ordinarily . . . file . . . in a lower court first" – there are relatively few cases like this one involving a silent denial with no lower court adjudication to examine. This Court's own experience with California habeas cases bears this out. *See Carey*, 536 U.S. at 217 (noting that habeas petition was filed "in the state trial court"); *Chavis*, 546 U.S. at 195 (same); *Ylst*, 501 U.S. at 800 (same).

In the context of California capital habeas petitions, which are filed directly with the state supreme court, the state court generally makes clear exactly which claims have been addressed "on the merits" and which have been procedurally defaulted. *See, e.g.*, *Robbins*, 18 Cal. 4th at 822-25; *Gallego*, 18 Cal. 4th at 854-56. In 2001 for example – the same year the summary order was issued here – the state supreme court issued summary dispositions in 18 capital-case habeas petitions. Each disposition contained an explicit denial "on the merits" of every claim. *See In re Nicolaus*, No. S060675, 2001 Cal. LEXIS 312 (Cal. Jan. 17,

(Continued on following page)

B. Assuming The Silent Denial Of Richter's *Strickland* Claim Was On The Merits, § 2254(d) Applies Only To Those Components Of The Claim Which The State Court Actually Resolved.

The substantive constitutional issue raised here is Richter's claim that counsel provided ineffective representation under *Strickland*. Such claims require petitioners to prove (1) deficient performance on counsel's part and (2) prejudice. *Strickland*, 466 U.S. at 687. In *Strickland* itself this Court observed "there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the

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2001); *In re Stansbury*, No. S066681, 2001 Cal. LEXIS 535 (Cal. Jan. 30, 2001); *In re Riel*, No. S084324, 2001 Cal. LEXIS 1313 (Cal. Feb. 28, 2001); *In re Benson*, No. S094994, 2001 Cal. LEXIS 1315 (Cal. Feb. 28, 2001); *In re Fauber*, No. S065139, 2001 Cal. LEXIS 1572 (Cal. Mar. 14, 2001); *In re Jones*, No. S092494, 2001 Cal. LEXIS 1944 (Cal. Mar. 28, 2001); *In re Coddington*, No. S085976, 2001 Cal. LEXIS 3283 (Cal. Mar. 28, 2001); *In re Johnson*, No. S090040, 2001 Cal. LEXIS 3815 (Cal. June 13, 2001); *In re Sanders*, No. S094849, 2001 Cal. LEXIS 3816 (Cal. June 13, 2001); *In re Musselwhite*, No. S063433, 2001 Cal. LEXIS 4821 (Cal. July 18, 2001); *In re Silva*, No. S070879, 2001 Cal. LEXIS 5240 (Cal. July 27, 2001); *In re Bradford*, No. S084903, 2001 Cal. LEXIS 5738 (Cal. Aug. 29, 2001); *In re Padilla*, No. S043733, 2001 Cal. LEXIS 6153 (Cal. Sept. 21, 2001); *In re Majors*, No. S062533, 2001 Cal. LEXIS 6370 (Cal. Sept. 19, 2001); *In re Noguera*, No. S068360, 2001 Cal. LEXIS 7044 (Cal. Oct. 17, 2001); *In re Majors*, No. S101360, 2001 Cal. LEXIS 7472 (Cal. Oct. 31, 2001); *In re Weaver*, No. S073709, 2001 Cal. LEXIS 7845 (Cal. Nov. 14, 2001); *In re Frye*, No. S087755, 2001 Cal. LEXIS 9205 (Cal. Jan. 24, 2001).

inquiry if the defendant makes an insufficient showing on one." *Id.* at 697.

The state ignores this observation, instead arguing that where a state court summarily "dispose[s]" of a *Strickland* claim on the merits, a federal court should presume the state court adjudicated the merits of both the performance and prejudice prongs. PB 32-33. Based on this presumption, the state suggests federal courts must apply § 2254(d) to both of these presumed rulings. PB 33-38.

Of course, because the silent denial here was *not* an adjudication on the merits at all, the narrower question of whether federal courts should presume the state court resolved both prongs (and provide § 2254(d) deference) is simply not before the Court. But even if the summary disposition here were on the merits, the suggestion that federal courts should presume the state court adjudicated both prongs of the *Strickland* analysis not only ignores the burden of proof on this issue, but creates a presumption which is entirely at odds with how *Strickland* cases are generally resolved.

As an initial matter, the state's argument that mere disposition of a *Strickland* claim constitutes a merits adjudication on both prongs was rejected in both *Porter* and *Wiggins*. In both cases, petitioners raised *Strickland* claims which the state courts rejected by addressing only one of the *Strickland* prongs, never addressing the other. In both cases – although the state court had plainly "dispose[d]" of the *Strickland* claim – this Court held § 2254(d) deference applied only to the prong actually adjudicated on the merits. *Porter*, 130 S.Ct. at 452; *Wiggins*, 539 U.S. at 534. In short, where a state court summarily rejects a *Strickland* claim on the merits, § 2254(d) applies only to those prongs which have actually been adjudicated.

Where, as here, a summary disposition on the merits of a *Strickland* claim does not reveal which prong or prongs were resolved, the burden of proof may be critical. If the state has the burden of proving an adjudication on the merits, and that burden is not met, § 2254(d) does not apply. If the petitioner has the burden of proving there was no adjudication, and the burden is not met, § 2254(d) applies.

The text of AEDPA shows that when Congress wanted to impose a burden of proof on a habeas petitioner, it did so. *See* 28 U.S.C. § 2254(e)(1) ("The applicant shall have the burden of rebutting the presumption of correctness. . . ."). In § 2254(d), Congress did not explicitly allocate the burden of proof on this issue to either party. However, in light of fundamental principles of statutory construction, it did not have to.

As noted above, 28 U.S.C. § 2254(a) permits habeas relief for state petitioners in custody "in violation of the Constitution." Section 2254(d) bars relief where the petitioner's claims have been "adjudicated on the merits" in state court. Accordingly, traditional principles of statutory construction compel a conclusion it is the state's burden to prove an adjudication on the merits. *See, e.g.*, *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S.Ct. 2395, 2400 (2008) ("When a proviso . . . carves an exception out of the body of a statute . . . those who set up such exception must prove it. . . . That longstanding convention is part of the backdrop against which Congress writes laws, and we respect it unless we have compelling reasons to think that Congress meant to put the burden of persuasion on the other side."); *accord NLRB v. Kentucky River Cmty. Care Inc.*, 532 U.S. 706, 711 (2001).

The state neither disputes nor even addresses this proposition. But the state's suggestion that federal courts should simply presume there has been a merits adjudication on both prongs of the *Strickland* test utterly ignores that it is the state's burden to prove an adjudication.

The state's suggestion also would create a presumption starkly at odds with the way courts resolve *Strickland* claims. There is certainly no reason to think Congress was unaware of *Strickland*'s very practical admonition that courts need not resolve both prongs of the *Strickland* formulation in rejecting an ineffective assistance claim. Nor is there any reason to think Congress was unaware that for similarly practical reasons, courts rejecting *Strickland* claims often resolve only one prong. *See, e.g.*, *Porter*, 130 S.Ct. at 452; *Wong v. Belmontes*, ___ U.S. ___, 130 S.Ct. 383, 386 (2009); *Wiggins*, 539 U.S. at 534;

Yarborough v. Gentry, 540 U.S. 1, 4-11 (2003). California courts also take this exact approach. *See, e.g.*, *In re Ross*, 10 Cal. 4th 184, 204 (1995); *In re Fields*, 51 Cal. 3d 1063, 1079 (1990). Embracing a presumption that summary dispositions reflect a merits resolution of both prongs flies in the face of this practical experience.

This Court addressed a similar situation in *Ylst*. There, defendant urged the Court to presume that in issuing a silent denial, the state supreme court "disregard[ed] [a lower court's procedural] bar and consider[ed] the merits." *Ylst*, 501 U.S. at 803. The Court refused precisely because it was "a most improbable assessment of what actually occurred." *Id.* at 804. Instead, the Court embraced a contrary presumption which "most nearly reflect[ed]" the role actually played by silent denials in the state system. *Id.*

The same approach should be taken here. Where a state court summarily denies the merits of a *Strickland* claim, presuming the court resolved both the prejudice and performance prongs is simply "a most improbable assessment of what actually occurred." Instead, where a *Strickland* claim is summarily denied on the merits, although federal courts can presume that at least one of *Strickland*'s two prongs was resolved, in the absence of proof as to which prong was actually resolved, § 2254(d) does not apply.

This is entirely consistent with Congress's intent in enacting § 2254(d). That section constitutes a significant change from prior law and provides an equally significant litigation advantage to the state in connection with claims adjudicated on the merits in state court. *Porter* and *Wiggins* establish § 2254(d) does not apply to those parts of a *Strickland* claim which were *not* adjudicated on the merits in state court. Requiring the state to prove what has actually been adjudicated on the merits is a minimal burden for the state to meet in order to get the considerable benefits of § 2254(d). Ultimately, however, because the silent denial here was not on the merits in the first place, there is no reason to resolve this question.[8]

C. Applying § 2254(d) To Unexplained State-Court Dispositions Ignores §§ 2254(d)(1) And (2) And Leads To Absurd Results Which Congress Could Not Have Intended.

The state and its amici argue that where a state summary disposition constitutes an adjudication on the merits, the absence of reasoning does not preclude application of § 2254(d). PB 23-32; CJLF 7-23; TB 7-19. Once again, however, because the silent denial here was not a merits adjudication at all, this broad question is also not before the Court.

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[8] Proving what has actually been adjudicated on the merits does not require proof of the state court's actual reasoning. That separate issue, addressed by the state and its amici at length, is discussed below. Instead, it simply requires proof of what prong was actually adjudicated on the merits.

Although this issue is addressed in detail in the NACDL amicus brief filed in support of Richter, several points are noteworthy. The state's argument rests on the statutory construction principle that "when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." PB 25, *citing Dodd v. United States*, 545 U.S. 353, 359 (2005). If the silent denial here was a merits adjudication, and if this Court presumes the state court resolved the merits of both prongs of the *Strickland* claim, then § 2254(d) deference would indeed be required here so long as the Court read no further than the "adjudicated on the merits" clause of § 2254(d).

However, § 2254(d) does *not* end at the "adjudicated on the merits" clause. Instead, in §§ 2254(d)(1) and (2) Congress went on to provide mechanisms by which petitioners could prove § 2254(d) did not bar relief, requiring determinations as to whether the state court decision "involved an unreasonable application" of federal law or was "based on an unreasonable determination of the facts." In accord with this plain language, the inquiries required by these sections require an analysis of the state court's reasoning. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259-60 (2007); *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002); *Wiggins*, 529 U.S. at 527-28; *Williams v. Taylor*, 529 U.S. 362, 397 (2000); *Early v. Packer*, 537 U.S. 3, 8 (2002) (applying § 2254(d)(1) by examining "the reasoning [and] the result of the state-court decision"). Thus, applying § 2254(d) to summary dispositions which have no reasoning is entirely inconsistent with Congress's considered decision to provide exceptions to § 2254(d) which depend on an analysis of the state court's reasoning. *See United States v. Nordic Village Inc.*, 503 U.S. 30, 35-36 (1992) ("[A] statute must, if possible, be construed [so that] every word has some operative effect.").

But applying § 2254(d) where there is no state court reasoning does more than undercut §§ 2254(d)(1) and (2). Where a state court analyzes federal claims and articulates reasoning for its decision, that decision is subject to the scrutiny of a federal court making the inquiries prescribed by § 2254(d). As the Court's own experience in *Williams*, *Abdul-Kabir* and *Wiggins* has shown, sometimes this scrutiny shows the state court applied the wrong law, applied the correct law but ignored or got wrong key facts, or simply failed to consider all parts of a claim.

Applying § 2254(d) to unexplained decisions creates a perverse incentive structure for state courts: the less the state court says and does, the greater benefit it gets from § 2254(d). If a state court says nothing at all, such decisions may be virtually immune from federal review. Section 2254(d) should not be construed to create such a disincentive for state courts to explain their reasoning. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (refusing to interpret statute to reach an absurd result which Congress could not have been intended). *Compare Monge v. California*, 524 U.S. 721, 734 (1998) (refusing to interpret the Double Jeopardy clause to "create disincentives" for the states to provide procedural protections for trials on enhancement allegations).

If the Court construes § 2254(d) to apply to unreasoned state court dispositions on the merits, the Court must then decide how that section is to be applied. Some lower courts have charted a course designed to apply § 2254(d) to summary dispositions but avoid some of the pitfalls discussed above. *See, e.g., Ryan v. Miller*, 303 F.3d 231, 245-46 (2d Cir. 2002). Indeed, one of the state's own amici cites *Ryan* as a model for application of § 2254(d). CJLF 20-21.

In *Ryan*, after defendant was convicted of murder he contended admission of certain evidence violated his confrontation clause rights. The state court summarily denied the claim without reasoning and the district court denied relief. On appeal, the Second Circuit first held that § 2254(d) applied notwithstanding the absence of reasoning. *Ryan*, 303 F.3d at 245-46. But because there was no reasoning to reference in analyzing §§ 2254(d)(1) and (2), the court started with an analysis of whether there was clearly established federal law governing the case. *Id.* at 247-49. Concluding there was, the court then applied that law to see if there was a constitutional violation. *Id.* at 249-51. Concluding there was a violation, the court went on to decide if the state court's contrary ruling was objectively unreasonable – not merely wrong, but so clearly wrong that "the state court was objectively unreasonable in not finding a Confrontation Clause violation." *Id.* at 251-52.

Many courts around the country, including the Ninth Circuit, have followed a functionally similar approach. These courts have referred to this approach as "independent review" and held that, absent state-court reasoning, federal courts must independently review the law to determine if there is clearly established federal law, independently review the record to see if there is constitutional error and then determine if the state court's unexplained contrary ruling is unreasonable. *See, e.g.*, *Paine v. Massie*, 339 F.3d 1194, 1198-1205 (10th Cir. 2003); *Harris v. Stuvall*, 212 F.3d 940, 943 (6th Cir. 2000); *Aycox v. Little*, 196 F.3d 1174, 1177-78 (10th Cir. 1999); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). Both the three-judge and en banc panels below applied this standard. Pet. App. 64a, 98a. And not only did the state make no objection, it explicitly relied on this intermediate approach. *Richter v. Tilton*, 06-15614, Respondent's Brief at 30-31.

While the *Ryan* approach is not perfect, it reduces the incentive for state courts to do less. It also provides a systematic way for federal courts to approach the issue so they can further Congress's general intent to shift the focus to the state court decision without undercutting Congress's provision of §§ 2254(d)(1) and (2).

In sum, the position advocated by the state here undercuts the exceptions to § 2254(d) Congress deliberately included in AEDPA and creates an obvious disincentive for state courts to resolve federal constitutional claims with considered opinions. And while several courts have charted a more moderate approach, because the silent denial used here was not an adjudication on the merits in the first instance, § 2254(d) does not apply, and there is simply no need to resolve the general summary disposition issue here.

II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO INVESTIGATE THE THEORY OF DEFENSE HE HIMSELF (1) SELECTED, (2) PROMISED THE JURY IN OPENING STATEMENT, (3) CALLED HIS CLIENT TO SUPPORT AND (4) RELIED ON IN CLOSING ARGUMENT.

The district court concluded, "the jury heard two very different theories explaining the evidence." ER 3. According to the court, trial counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." ER 11. The court was right on both counts.

The state argued: (1) there was no gun battle in the house, (2) Klein was shot on the couch and (3) the large blood pool in the bedroom doorway was deposited by Johnson as he stood there, dripping blood and waiting for police. The defense argued: (1) there was a gun battle in the house, (2) Klein was not shot sleeping on the couch but in a crossfire while standing between the living room and bedroom where he fell to the floor, and (3) the blood pool was not deposited by Johnson, but by Klein.

As these starkly different versions show, if the blood pool was made by Johnson, Richter's version is false. Just as clearly, however, if the blood pool was made by Klein, Johnson's version is false. The source of the blood pool was critical to both the defense and state theories of the case.

At trial, however, defense counsel neither investigated nor presented blood spatter testimony to support his theory of the case. This despite an opening statement in which he (1) promised jurors the evidence would show "Patrick Klein was not shot there on the couch," (2) referenced the "pools of blood" as "evidence of great importance" which was "inconsistent with the stories told by Gunner Johnson," (3) contended "the evidence will show that . . . after Patrick was shot [Johnson] moved him to the couch" and (4) explained "[t]he evidence will show you that in the bedroom there is a pool of blood right in the entrance [to the bedroom]. . . . There is also a trail of blood from there to the couch." ER 134-35, 138, 142. This despite calling Richter to testify that when he entered the house, he saw Klein lying in the bedroom doorway. RT 1090. This despite arguing the same theory to the jury in his closing argument: the blood pool proved not only that Johnson was lying, but that Klein had been caught in a cross-fire. RT 1510-12.

In both state and district court, Richter presented testimony from blood spatter expert Ken Moses. Based on his analysis of the blood pool, Moses concluded that the state's theory Johnson was the source of the blood pool could be "eliminate[d]." ER

83. The district court found counsel could have presented expert testimony that:

> [T]he State's theory that Johnson deposited the pool of blood in his doorway is scientifically unreliable.
>
> [T]he pool of blood . . . could not have been made by someone standing and dripping blood.

ER 11. The state stipulated to admission of Moses's expert testimony without cross-examination (ER 399) and did not offer any contrary testimony.

At his federal court-ordered deposition, defense counsel agreed it was important to his theory to "try to show [the blood pool] was at least partially the other gentleman's blood, meaning Klein's blood." ER 283. Counsel failed to investigate his theory before or during trial not out of tactics, but because he simply did not consider it. ER 245, 289-90.

The en banc panel held that counsel's failure to investigate and present evidence supporting his own defense was both unreasonable and prejudicial. The state disagrees on both counts. As to performance, the state ignores counsel's stated reasons entirely and argues counsel was entitled to rely on cross-examination of the state's experts. PB 41. As to prejudice, the state argues the source of the blood pool was "at best only a peripheral issue" and the new evidence does not undercut the state's case. PB 47-51, 60.

As discussed more fully below, the state's arguments should be rejected regardless of whether § 2254(d) applies to this case. Counsel's failure to investigate the defense he promised to the jury, relied on at trial, and argued in closing was fundamentally unreasonable. And because Moses's testimony supports Richter's testimony, undercuts the state's entire explanation for the blood pool and directly impeaches Johnson's testimony as to how Klein was shot, the writ was properly granted.

A. Defense Counsel Unreasonably Failed To Investigate The Theory Of Defense He Himself Selected And Relied On Throughout His Case.

When a criminal defendant seeks relief because his counsel has provided inadequate representation, two elements must be proven: (1) counsel's performance fell below an "objective standard of reasonableness," and (2) but for counsel's errors there is a "reasonable probability" the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 693. In applying *Strickland*'s performance prong, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 691. But where counsel utterly ignores "pertinent avenues of investigation," the decision not to investigate is not a reasonable professional judgment. *Porter*, 130 S.Ct. at 453.

This Court has recognized that where a criminal defense lawyer affirmatively selects a defense theory of the case, stands by that theory throughout the presentation of evidence, and relies on that theory in closing argument, the lawyer's failure to investigate readily available evidence supporting that theory is unreasonable. *See, e.g.*, ***Wiggins***, 539 U.S. at 526 (holding defense counsel's conduct unreasonable where he promised the jury would "hear that Kevin Wiggins has had a difficult life" but failed to investigate or present evidence showing severe physical abuse as a child prior to age six and extreme physical abuse, sexual molestation and rape thereafter while in foster care); ***Porter***, 130 S.Ct. at 449 (holding defense counsel's conduct unreasonable where he "told the jury that Porter 'has other handicaps that weren't apparent during the trial' and Porter was not 'mentally healthy,'" but failed to "put on any evidence related to Porter's mental health" including evidence showing "his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.")

Every circuit to address this question has reached the same result. Where defense counsel selects a theory of defense and relies on it throughout the case, counsel acts unreasonably in failing to at least investigate evidence directly supporting the defense he himself has chosen. *See, e.g.*, ***Dugas v. Coplan***, 428 F.3d 317, 328-29 (1st Cir. 2005); ***Clinkscale v. Carter***, 375 F.3d 430, 443 (6th Cir. 2004); ***Soffar v. Dretke***, 368 F.3d 441, 473 (5th Cir. 2004); *Eze v. Senkowski*, 321 F.3d 110, 126-30 (2d Cir. 2003); *Pavel v. Hollins*, 261 F.3d 210, 219 (2nd Cir. 2001); *Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir. 1999); *Chambers v. Armontrout*, 907 F.2d 825, 828-30 (8th Cir. 1990); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990).

Here, defense counsel's theory in opening statements was that the physical evidence (including the blood pool) showed Klein was not killed on the couch. His theory throughout trial and closing argument was the same. But as the prosecutor correctly noted in his closing argument, defense counsel introduced no evidence to support his theory – it was just argument. RT 1607. Under these circumstances, counsel should have at least investigated the theory on which he was relying.

The state urges a contrary result, arguing defense counsel (1) believed "trial would be primarily a credibility case," and (2) was entitled "to choose to rely on effective cross-examination of the prosecution's expert witnesses," especially since the cross-examination here was "to good effect." PB 39, 41, 46.

The state's first observation is entirely correct. Defense counsel here did indeed believe, correctly, the case would be a credibility contest between Johnson and Richter. But this is the problem, not the solution.

Every court to address this issue has held that when trial counsel in a criminal case recognizes the case will come down to a credibility contest between defendant and a state witness, counsel's failure to at least investigate readily available testimony directly supporting the defense is unreasonable. *Ramonez v. Berghius*, 490 F.3d 482, 488-90 (6th Cir. 2007) (failure to present evidence supporting defendant's testimony violated *Strickland* where the trial "boil[ed] down to a credibility contest"); *Clinkscale*, 375 F.3d at 445 (failure to present evidence supporting defendant's testimony violated *Strickland* where the "evidence essentially boiled down to a credibility contest" between defendant and the state's only eyewitness); *Pavel*, 261 F.3d at 223-24; *Lindstadt v. Keane*, 239 F.3d 191, 203 (2d Cir. 2001) ("[i]n a credibility contest, the testimony of neutral disinterested witness is exceedingly important."); *Holsomback v. White*, 133 F.3d 1382, 1385-87 (11th Cir. 1998); *Williams v. Washington*, 59 F.3d 673, 681-82 (7th Cir. 1995); *Griffin v. Warden*, 970 F.2d 1355, 1359-60 (4th Cir. 1992); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985). As these cases uniformly recognize, it is hardly eccentric to require defense counsel in a serious criminal case to investigate the physical evidence when he knows the case will be a credibility contest which could be determined by the physical evidence. Counsel here was fundamentally unreasonable in failing to investigate the defense he himself selected, promised the jury in opening statement, called his client to support and relied on in closing argument.

Alternatively, the state suggests counsel was entitled "to choose to rely on effective cross-examination of the prosecution's expert witnesses." PB 41. This suggestion fares no better for three reasons.

First, defense counsel himself did not offer this as his explanation for failing to investigate his own defense. *See Wiggins*, 539 U.S. at 526-27 (in the absence of a strategic reason offered by counsel for a particular choice, both courts and the state must avoid substituting a "*post hoc* rationalization of counsel's conduct.") *Accord Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009); *Keith v. Mitchell*, 466 F.3d 540, 543-44 (6th Cir. 2006); *Dugas*, 428 F.3d at 333-34; *Smith v. Mullin*, 379 F.3d 919, 929 (10th Cir. 2004); *Brown v. Sternes*, 304 F.3d 677, 691, 695 (7th Cir. 2002); *Griffin*, 970 F.2d at 1358. The state is defending a tactical judgment trial counsel simply did not make.

Second, counsel's failure to investigate his own defense has nothing to do with the state's subsequent decision to call Bell as an expert. As counsel himself conceded, "even before" the state decided to call Bell as a witness, it was "always [his] intention" to argue the blood pool proved "Mr. Klein had been shot [in the bedroom] . . . as opposed to being shot on the couch." ER 374.

The fact of the matter is that counsel's failure to investigate left him unable to support either his client's own testimony or the theory of defense that counsel himself had selected. It also left him unable to rebut Bell's testimony with expert testimony of his own. These failures occurred not out of tactics, and not because he was relying on cross-examination, but – as counsel admitted – because he simply did not consider such experts and was unaware such testimony could be obtained. ER 245, 289-92.

Even putting aside both points, however, the argument that counsel here reasonably decided to rely on cross-examination is still meritless. And this is so even though the major premise of the argument – that there are certain circumstances under which a defense lawyer may reasonably decide to rely on cross-examination of a state expert rather than calling his own expert – is unobjectionable.

As this Court has held, there is nothing "reasonable" about a tactical choice not to present evidence where counsel fails to investigate the evidence and thus does not even know what it is. *Wiggins*, 539 U.S. at 522-23. Consistent with *Wiggins*, lower courts hold that a decision to rely exclusively on cross-examination of a state expert is uninformed, and fundamentally unreasonable, where defense counsel has not educated himself, such as by consultation with appropriate experts or literature, so that he is prepared to present the defense case through cross-examination of the state's witness. *See Dugas*, 428 F.3d at 328-32; *Gersten v. Senkowski*, 426 F.3d 588, 610-11 (2d Cir. 2005); *Lindstadt*, 239 F.3d at 201-02.

So even if counsel had made the decision to rely on cross-examination, that decision would have been unreasonable. Defense counsel admitted he did not investigate his defense by consulting a blood spatter expert at any point. ER 245, 289-90. At the time of the 1995 trial, counsel had only done one previous murder case. ER 228-29. Years later – at the 2004 deposition – trial counsel readily conceded that the satellite drop issue was one he would now "pick . . . up . . . quickly" because "I've had other cases." ER 289. But at trial, he simply did not consider obtaining a blood spatter expert. ER 289-90.

Trial counsel's cross-examination of Bell reflected his complete lack of knowledge as to the morphology of blood drops. The state alleges that defense counsel cross-examined Bell "to good effect" because Bell admitted (1) "he could not tell by looking at the blood on Klein's face in what position Klein had been when he was shot," (PB 8) (2) "because of the absence of a bullet hole in the armrest of the couch, it was unlikely that Klein had been lying down on the couch when he was shot," (PB 8) and (3) "he could not 'use the blood evidence to establish' where [on the couch] Klein had been when he suffered . . . the neck wound." PB 39-40. But all these snippets show is that counsel's cross-examination established that Bell could not pinpoint Klein's exact posture when shot on the couch – whether he was sitting up or lying down. Nothing in this cross-examination furthered the defense theory that Klein was not on the couch when shot but was instead in the bedroom doorway.

In the final analysis, the state's suggestion that the en banc majority created a "per se rule requiring counsel to investigate and produce expert-opinion testimony" misses the real deficiency of counsel's conduct here. PB 53. In fact, the issue here is not really about expert testimony at all, but is about the general obligation defense counsel has at least to investigate the defense he has selected, promised the jury, called his client to support and relied on in closing argument. Thus, the argument made here would be the same if counsel had promised the jury an alibi defense in opening statement, called his client to support that defense, relied on that defense in closing, but failed to investigate or present readily available evidence to prove the alibi. As this example shows, the issue here has little to do with expert testimony itself and everything to do with requiring counsel to investigate his own theory of defense – whether through experts or lay witnesses. Contrary to the state's argument, such a requirement is neither "novel" nor "rigid." PB 53, 54. It is simply common sense.

B. Because A Blood Spatter Expert Would Have Corroborated The Defense Theory Of The Case And Proven Johnson Was Lying, Counsel's Failure Was Prejudicial.

As noted, in order to prove ineffective representation, a defendant must show not only inadequate performance but that absent counsel's errors there is a "reasonable probability" the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The state argues any failure to present the blood spatter testimony was harmless because the source of the blood pool was "at best, only a peripheral issue" and would not have undercut the state's case. PB 60.

This argument ignores that two starkly different theories were presented to the jury: (1) the state's theory "Klein was shot in cold-blood on the couch" and (2) the defense theory "Klein was shot not on the couch while asleep but during a struggle in the bedroom." Pet. App. 27a. If the blood pool was from Klein (1) Klein was not shot on the couch, (2) Johnson lied about the shooting, and (3) the state's theory of the case was false. If the blood pool was from Johnson (1) Klein was shot on the couch, (2) Johnson was telling the truth, and (3) the defense theory was false. As noted, the en banc majority recognized this exact point. Pet. App. 125a.

Thus, the entire defense theory that Klein was shot during a struggle, rather than in cold-blood on the couch, depended on establishing where Klein was shot. In short, Richter's credibility and the efficacy of the defense theory rested on the source of the blood pool, as did Johnson's credibility and the state's case. The source of the blood pool was not peripheral to the case, it was central.

Alternatively, the state argues that because police failed to take a sample of the blood pool, Richter's "claim of prejudice is a chimera because the source of the blood pool can never be known. . . ." PB 47. According to the state, "none of Richter's proffered habeas corpus experts could offer more than mere speculation that Klein's blood *might have been* in the pool." PB 49.

We will start with a point of agreement. If indeed the "source of the blood pool can never be known," and the habeas experts could offer nothing "more than mere speculation that Klein's blood *might have been* in the pool" then the state is correct – there would be no prejudice. So it is worth examining the actual record.

Blood spatter expert Kenneth Moses specifically concluded that the state's theory Johnson was the source of the blood pool could be "eliminate[d]." J.A. 118. After explaining the satellite drop phenomena, and reviewing photographs of the blood pool showing no satellite drops, Moses's conclusion was clear:

> The lack of a large number of satellite droplets [sic] surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing in[ ] the doorway dripping into the pool below.

In light of the clarity of this conclusion, it is difficult to understand the state's complaint that "the source of the blood pool can never be known" and its suggestion that Moses could only "speculate[ ] Klein's blood *might have been* in the pool." After all, once the state's theory that Johnson was the source of the blood pool is "eliminate[d]," Klein is the only other source. This is not "speculation" at all.

The state's argument is especially difficult to understand given its concession there were no satellite drops surrounding the blood pool. J.A. 143. As a result, in district court the state stipulated to admission of Moses's expert conclusion without cross-examination and without presenting any contrary testimony. ER 399. And the state no longer even defends the trial prosecutor's position that Johnson was the source of the blood pool. PB 1-61. The state's suggestion Richter has not proven Johnson could be eliminated as the source of the blood pool is made not by relying on the record, but by ignoring it almost entirely.

Finally, the state argues that proving Klein was the source of the blood pool makes no difference because "the defense's 'shootout' theory was doomed to fail" in light of Bell's testimony that (1) there was high velocity blood spatter on the wall near the couch "that irrefutably showed that someone must have been shot on or near the couch," and (2) there was no evidence of a trail of blood leading from the bedroom door to the couch which would suggest that Klein had ever been moved from one part of the house to another after he had been shot." PB 19, 48.

As discussed in some detail above, there was *no* "high-velocity blood spatter on the wall by the couch." None at all. Bell explicitly conceded there was no such spatter on the wall and all parties recognized this in closing arguments. RT 230, 1457-58, 1585, 1612. Bell further conceded there was no such spatter on either the sleeping bag or the couch itself. RT 162, 183-84.[9]

Moreover, Bell never testified "there was no evidence of a trail of blood leading from the bedroom . . . to the couch." PB 48. Although the state repeats this argument three times without citation (PB 40, 48, 50), when asked about this subject, Bell admitted (1) there was "blood dripped at near the [bedroom] door and as well as near the edge of the couch," (2) he could "[not] recall specifically how much blood was in the center of the carpeted living room" and (3) blood spatter was difficult to see on fabric such as "heavy carpeting." RT 148, 195. And as defense counsel specifically pointed out in closing argument, photographs and videotape revealed "drippings" and "some kind of linear blood" supporting the defense theory that Klein was moved to the couch. RT 1514.[10]

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[9] Because the state erroneously suggests the blood spatter was on the wall, it never addresses the obvious implications from the lack of blood on the wall, the couch and the sleeping bag. Under the state's theory, the two blood drops about which Bell did testify had to miss the couch, sleeping bag and wall behind Klein, vault over the armrest of the couch and drop straight down to land on clutter on the ground below the couch. As Branscombe's counsel explained in closing, "if Mr. Klein was shot while he was lying on that sofa . . . there should be some atomized blood spatter somewhere" and "there would be more than two drops." RT 1585. Put simply, the blood spatter evidence hardly proved guilt, "irrefutably" or otherwise.

[10] The state correctly notes that a .22 caliber casing found at the crime scene was the same brand of ammunition found in a drawer in Richter's garage. PB 3, 19, 22, 40, 50-51. The

(Continued on following page)

Ultimately, the outcome in this case depended on whether the jury would believe Johnson or Richter. And the jury plainly had trouble with this question. Despite eyewitness testimony from Johnson, the jury deliberated more than 14 hours and returned twice with requests to have testimony re-read. CT 310-18.

There was good reason for the jury's pause. After all, Johnson gave four different stories to police and never explained why he failed to identify Richter (who he knew well) until the fourth version. Moses's expert opinion refutes the state's explanation for the blood pool, it raises significant doubts as to Johnson's credibility and it directly supports Richter's version of events. Because the source of the blood pool was critical to both the state and defense cases, counsel's failure to present this kind of credible forensic evidence

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suggestion is that (1) the ammunition in Richter's garage belonged to Richter and (2) because the brands matched, Richter was the shooter.

There is no need to dwell on the value of the second premise, because the first premise is unsupported by the record. Not only was there no evidence Richter ever owned a gun that could fire this ammunition, there was ample evidence connecting the ammunition to Johnson. Johnson and Richter both testified that before the shooting, Johnson stored his safe and other belongings in Richter's garage. RT 483-85, 573-74, 1054-55. After the shooting, police searched the garage and found sitting in the same drawer, a drug scale, the .22 caliber ammunition, and shotgun ammunition. RT 431-32. At trial Johnson admitted he was a drug dealer, and that he owned both a .22 and a shotgun. RT 474, 481.

to supporting the defense case undermines confidence in the jury's verdict.

As the lower court held, this is so regardless of whether § 2254(d) applies. Pet. App. 98a. Even if § 2254(d) is applied through the lens of the *Ryan*/independent review methodology discussed above, relief is required.

The first step of *Ryan* is straightforward: *Strickland* is the clearly established federal law governing this case. For the reasons discussed above, the second step of that methodology – applying this law – compels a conclusion that counsel's failure to investigate his own theory of defense was both unreasonable and, given the central nature of Klein's location to both the state and defense theories of the case, prejudicial.

To the extent the state court's unexplained contrary decision rested on a view there was no performance prong violation because counsel elected to rely on cross-examination of the state's expert, or actually performed a cross-examination as to whether the blood pool showed Klein was on the couch (the explanations now given by the state), such a view is objectively unreasonable since these factual premises are false. To the extent the state court's unexplained contrary decision rested on a view there was no prejudice prong violation because there was high-velocity blood on the wall, or no evidence of a blood trail (again the explanations now given by the state), such a view was unreasonable for the same reasons.

Even if section 2254(d) applies to this case, it does not bar relief. The writ was properly granted.

◆

CONCLUSION

The Court of Appeals' judgment should be affirmed.

Respectfully submitted,

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REPLY
BRIEF

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In The
Supreme Court of the United States

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KELLY HARRINGTON, WARDEN,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

◆

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITIONER'S REPLY BRIEF ON THE MERITS

◆

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QUESTIONS PRESENTED

1. In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. §2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

2. Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984)?

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INTRODUCTION

As the State explained in its opening brief on the merits, the California Supreme Court's summary disposition of respondent Richter's ineffective-counsel claim was an adjudication on the merits of that claim. (Petitioner's Brief on the Merits [PBOM] at 21-24.) And, because it was an "adjudication on the merits," it was entitled under 28 U.S.C. §2254(d) to limited deferential review for reasonableness under "clearly established Federal law" as determined by the strict holdings of this Court's precedents. (*Id.,* at 24-32.) Nothing in the plain language or legislative history of section 2254(d) suggests that Congress conditioned deferential review of state-court merits adjudications on the issuance of an "explained" or written order detailing why the federal claim was denied. (*Id.* at 27-29.) Further, section 2254(d) deferential review of the California Supreme Court's ultimate decision is required even though Richter's claim invoked this Court's "two pronged" *Strickland* v. *Washington* test for effective counsel. (*Id.* at 32-38.) This is so because, since the state supreme court did not say that its adjudication of the claim was confined to a single prong, there is no basis for assuming that the court did not consider Richter's entire claim in denying relief. To suggest, as Richter does, that the state court might have considered only one part of Richter's claim is entirely speculative.

Therefore, this Court should hold that summary (that is, unexplained) state court dispositions of federal constitutional claims, including claims of ineffective assistance of counsel (see *Strickland* v. *Washington*, 466 U.S. 668 (1984)), are entitled to deference under section 2254(d).

The State's brief also explained that, in granting Richter habeas corpus relief on his claim, the Ninth Circuit committed multiple errors. First, instead of deferring under section 2254(d) to the state court's reasonable application of this Court's *Strickland* v. *Washington* rule of deference to reasonable investigative choices of defense counsel, the Ninth Circuit impermissibly substituted a rigid and unduly demanding legal standard requiring defense counsel to prepare for "any contingency" and to meet prosecution expert testimony with defense expert testimony. Under the proper *Strickland* rule, however, the state court record supported a reasonable conclusion validating counsel's reliance on cross-examination.

Second, the Ninth Circuit ignored the fact that the state-court record reasonably supported the conclusion that Richter's defense was not prejudiced. The Ninth Circuit exaggerated the importance of whether some of the murder victim's blood was pooled near a bedroom door several feet away from where his body was found. The myopic focus on this "blood pool" overlooks the most salient evidence of Richter's guilt: the bullet casing found near the deceased victim that was identical to that of bullets found in a box and loaded in a magazine for a semi-automatic pistol in Richter's bedroom. In addition, the court minimized counsel's success in cross-examining the prosecution's blood experts; and it grossly overstated the potential effect of the speculative and inconclusive expert opinions Richter proffered to the state court in support of his state habeas petition.

Because the state court's merits adjudication was at least "objectively reasonable" under the "doubly deferential" review prescribed by section 2254(d) and *Strickland*, Richter was ineligible for habeas corpus relief. (PBOM at 39-61.) The Ninth Circuit's decision should, therefore, be reversed.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S SUMMARY ADJUDICATION OF RICHTER'S INEFFECTIVE-COUNSEL CLAIM IS ENTITLED TO DEFERENTIAL REVIEW UNDER SECTION 2254(d)

A. The California Supreme Court's Unexplained Denials of Petitions for Writs of Habeas Corpus Have Been Properly Presumed to Be Decisions on the Merits Absent Strong Evidence to the Contrary

1. In his merits brief, Richter suddenly argues that the California Supreme Court's unexplained denial of his ineffective-counsel claim was not an adjudication on the merits of the claim. (Respondent's Brief on the Merits [hereafter RBOM] at 16-44.) But he never made any such claim in the district court or before either the three-judge panel or the en banc

court of appeals below. Nor, in those courts, did he ever question that the state court ruling was entitled to deferential review under section 2254(d). If he had raised such a novel claim in the Ninth Circuit, any doubt on the question might have been certified to the California Supreme Court for confirmation. See, e.g., *Evans* v. *Chavis*, 546 U.S. 189, 199 (2006).[1]

Richter never even raised such a claim in his brief in opposition to the State's certiorari petition. At that point, it was incumbent upon him there to bring to this Court's attention any dispute "that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. Now, after the grant of certiorari and in the middle of briefing on the merits, he seeks to raise for the first time a threshold challenge not only to whether the issue raised in the State's petition is properly before the Court, but also whether the important issue this Court raised sua sponte is properly presented. It is too late in the day for this.

2. This Court should not credit Richter's belated objection in any event. The Ninth Circuit has long recognized that an otherwise unexplained decision rejecting a habeas corpus claim by the California

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[1] If Richter had argued in his previous briefing that the Ninth Circuit's interpretation of California law in regard to "silent denials" was incorrect, that court could have asked the California Supreme Court to exercise its discretion and decide the issue as a certified question pursuant to California Rule of Court 8.548.

Supreme Court is a ruling on the merits of the claim. *Chambers* v. *McDaniel*, 549 F.3d 1191, 1197 (9th Cir. 2008) ("[U]nless a court expressly (not implicitly) states that it is relying upon a procedural bar, we must construe an ambiguous state court response as acting on the merits of a claim, if such a construction is plausible."); *Hunter* v. *Aispuro*, 982 F.2d 344, 346-47 (9th Cir. 1992) (the California Supreme Court's denial of a state habeas petition "without comment or citation constitutes a decision *on the merits* of the federal claims") (emphasis added); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) ("There is now no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition, except where a citation in the order tells us so."). In the circumstances of this case, this Court should defer to the local federal courts' interpretation of state practice. *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004).

Presumably, the California Supreme Court would have found an opportunity over the past few decades to correct the Ninth Circuit's view of state practice if it were erroneous. Although it does not generally adjust state practice in reaction to the federal habeas corpus statute, the state court obviously is aware of the effect of its procedures in later federal habeas corpus proceedings. And it hardly has proved shy about directly citing and correcting the Ninth Circuit's erroneous views of state law on any number of occasions. E.g., *People* v. *Box*, 5 P.3d 130, 152 n. 7

(Cal. 2000); *People* v. *Santamaria*, 884 P.2d 81, 92 (Cal. 1994); *In re Robbins*, 959 P.2d 311, 326 n. 15 (Cal. 1998).

The Ninth Circuit's interpretation, moreover, accords with this Court's own approach to state court rulings. In *Arizona* v. *Evans*, 514 U.S. 1, 7 (1995), this Court reaffirmed the presumption that state-court decisions are on the merits rather than on state law grounds, "to obviate the 'unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court.'" Nothing in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) suggests that Congress intended to abrogate that longstanding presumption.[2] When

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[2] Of course, this presumption can be overcome. In *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803 (1992), for example, the last "reasoned decision" from the state court had deemed the petitioner's federal claim forfeited under an independent and adequate state procedural-default rule; and nothing in a subsequent unexplained decision suggested that the later state court ruling was intended to forgive the procedural default. Similarly, depending on the circumstances, the California Supreme Court's denial of a habeas corpus petition on the merits does not preclude a federal court from also concluding that the petition was also denied as untimely. *Evans* v. *Chavis*, 546 U.S. at 198-201.

Richter contends that the State has changed its position regarding the proper interpretation of a "silent denial" from the position it expressed in the briefing in *Ylst* v. *Nunnemaker* and *Evans* v. *Chavis*. (See RBOM at 17, 23-25, 27-30 and n. 5.) The contention is specious. In *Ylst*, the State argued that silent denials can actually be interpreted in light of the last reasoned state court decision. In *Evans*, the State argued that in the great bulk of cases that petitions are denied on the merits. The State's

(Continued on following page)

Congress enacted AEDPA in 1996, the settled law both nationally and for California was that a state court's disposition of a federal claim was presumed to be on the merits unless the disposition included a "plain statement" of an independent and adequate state ground. *Harris* v. *Reed*, 489 U.S. 255, 264, n. 10 (1989). Congress was presumably aware of this when it enacted AEDPA. Cf. *Holland* v. *Illinois*, ___ U.S. ___, 130 S.Ct. 2549, 2561 (2010).

Richter's denial that the ruling in his case was "on the merits" is, in any event, unpersuasive. He and an amicus deduce from the wording of the ruling in his case and the wording of various other orders issued by the state supreme court on the same day, that the state court employs the simple and unexplained term "denied" when no majority on the court has voted for a "merits" or "procedural" denial. (RBOM at 29.) But his speculation should not suffice to upset the Ninth Circuit's long-standing

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position in regard to "silent denials" has never varied: ordinarily, such summary dispositions are "on the merits"; but, in some instances, the federal court must "look through" the "silent denial" to the last reasoned decision to determine if federal review of a constitutional claim is barred by a state procedural rule.

In the instant case, because the California Supreme Court's summary order denying Richter's petition for a writ of habeas corpus did not refer to a state procedural bar as the basis for denying relief, it must be presumed that the state court's decision was "on the merits." Nothing in this Court's decisions in *Ylst* and *Chavis* compel a different conclusion.

interpretation of unexplained California habeas rulings.

B. A State Court's Explanation of Its Reasoning in Denying a Federal Claim on the Merits is Not a Prerequisite to Section 2254(d) Deferential Review

Richter next contends that, even if the California Supreme Court ruling in his case is accepted as an adjudication on the "merits," "where a state court summarily rejects a *Strickland* claim on the merits, section 2254(d) applies only to those prongs which have actually been adjudicated." (RBOM at 36.) He says that "[e]mbracing a presumption that summary dispositions reflect a merits resolution of both prongs flies in the face of" the practical reality that courts typically resolve *Strickland* claims by analyzing one of the prongs before rendering a decision granting or denying relief. (*Id.* at 38.) Richter's argument boils down to this assertion: only explained state-court merits decisions are entitled to section 2254(d) deference, and then only those portions of the decisions that clearly explicate the precise basis for denying the federal claim. Nothing in the statute supports Richter's view.

1. As the State's opening brief explained, the plain language of section 2254(d) makes it clear that a state court is not required to explain the basis for its ruling in order for it to qualify for deferential review in federal court. The only prerequisite to

obtaining deferential review is that the claim "was *adjudicated on the merits* in State court proceedings. . . ." 28 U.S.C. §2254(d)(1) (emphasis added). (PBOM at 25.) The plain language of the statute focuses on the result—a merits adjudication—as laying down the proscription against habeas corpus relief that the petitioner must overcome. A state court decision is no less an "adjudication" on the merits simply because the state court did not explain why the claim lacked merit. See *Aparicio* v. *Artuz*, 269 F.3d 78, 93-94 (2d Cir. 2001); *Sellan* v. *Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001).

In choosing the term "decision" as opposed to either "opinion" or a comparable term denoting a written opinion, Congress confirmed its intention to afford section 2254(d) deference to all state-court merits adjudications, regardless of whether the basis for the merits adjudication is stated. See *McDermott Intern., Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) (Congress's use of a term of art in a statute is intended to have its established meaning). Had Congress intended to require state courts to issue written decisions explicating the bases for denying federal claims in order to invoke the deferential review-for-reasonableness standard set forth in section 2254(d) it easily could have done so.

This Court's interpretation of section 2254(d) in *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam) also supports the conclusion that "silent denials" are entitled to deferential review under section 2254(d). In *Early*, this Court held that the section 2254(d) bar against relief applied even where the state court decision did not cite any federal law, "much less the controlling Supreme Court precedents." This Court further held: "Avoiding [section 2254(d)'s] pitfalls does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.* (emphasis in original). This Court's decision in *Early* is consistent with its holding in *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002), that state court decisions are to be accorded the "benefit of the doubt" when assessing the reasonableness of their dispositions of federal claims.

Further, limiting deferential review to written or explained state-court merits decisions would be inconsistent with AEDPA's purpose "to give effect to state convictions to the extent possible under law." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000). (PBOM at 28.) Such a limitation would also be inconsistent with this Court's statement in *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991), that it "will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim. . . ."

2. Richter and an amicus argue that section 2254(d) mandates that a federal habeas court undertake certain "inquiries" that can only be accomplished by analyzing the state court's reasoning for denying a federal claim. (RBOM 39-44; NACDL Br. 12-25.) A reasoned decision is necessary, Richter

asserts, because state courts sometimes apply the wrong law, apply the correct law but ignore or get wrong key facts, "or simply fail[ ] to consider all parts of a claim." (*Id.*) In their view, deference to unexplained decisions makes the section 2254(d) exceptions, permitting relief for "unreasonable applications" of clearly-established law, unenforceable. (RBOM 39-43; NACDL Br. 12-25.)

Richter's reasoning is inconsistent with AEDPA's purposes. Moreover, Richter ignores the "presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. at 24. He mistakenly places state courts in a subordinate position to federal courts, whereas "[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990).

A federal court logically may undertake a proper section 2254(d) analysis without the benefit of an explained decision from the state court. With *Strickland* claims, for example, this Court has observed that, for a petitioner to obtain federal habeas relief under AEDPA, "he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell* v. *Cone*, 535 U.S. 685, 698-99 (2002). Here, Richter undeniably presented the California Supreme Court with an ineffective-counsel claim expressed in the very language of *Strickland*. (See, e.g., JA 15-24, 72-82.) Thus, the state court was tasked with deciding, based on the facts as alleged in the habeas petition submitted by Richter, whether Richter had made out a prima facie case of ineffective assistance under *Strickland*.

Similarly, in assessing the objective reasonableness of the state supreme court's summary disposition, a federal court need look no further than the factual allegations made in the state petition and provisionally assumed by the state court to be true, see *People* v. *Duvall*, 886 P.2d 1252, 1258 (Cal. 1995), and the clearly-established law at the time, see *Williams* v. *Taylor*, 529 U.S. 362, 390-91. The State's proffered presumption (that is, that the state court applied the proper "clearly established Federal law") comports perfectly with this Court's interpretation of the AEDPA. If, based on the record before the state court, the state court's rejection of a *Strickland* claim is objectively unreasonable, then the petitioner will have avoided section 2254(d)'s threshold bar to relief. No "explained" decision is needed.

That federal courts are perfectly able to assess the objective reasonableness of an unexplained denial of a *Strickland* claim is amply demonstrated by the various opinions below. Whereas the district court found that the state court decision was reasonable based on Richter's failure to show that counsel's performance was deficient (see App. at 36a-44a), the three-judge panel found that the decision was reasonable in light of weaknesses in Richter's showing of prejudice. (App. at 65a-72a.)

3. Nor is it significant that a "claim," such as Richter's ineffective-counsel claim, is comprised of two components. The state court's rejection of *the claim* remains a merits adjudication nonetheless.

Richter asserts, however, that it is irrational "to think that Congress was unaware that . . . courts rejecting *Strickland* claims often resolve only one prong" (RBOM at 37), and then suggests that "in the absence of proof as to which prong was actually resolved, §2254(d) does not apply." (*Id.* at 38.) But it is hardly an invariable practice for a court to confine itself to considering just one prong of a *Strickland* claim, and Richter in no way shows that it is the dominant practice. So there is no justification for presuming that the state court declined to consider both components of the claim, especially where such a dubious presumption would defeat section 2254(d) deference in the very kind of claims that typify the death penalty litigation system that AEDPA's very name shows was the immediate focus of Congress' reforms.

Moreover, Richter's argument essentially seeks to impose on the states an additional requirement that is both inconsistent with AEDPA's language and is at odds with the statute's intent. As an initial matter, in enacting AEDPA Congress must be presumed to have been aware that, like *Strickland* claims, virtually all federal constitutional claims involve two or more independent components. Had Congress intended to require state courts to indicate how or whether they had considered each component of a constitutional claim, Congress surely would have included such a requirement in the statute. But they did not do so.

As discussed, so long as a federal claim was adjudicated "on the merits," AEDPA imposes no further duty on the state courts to explain how or why they denied the claim. Instead, AEDPA unambiguously places the burden on the petitioner to demonstrate that the state court's denial of the claim was objectively unreasonable. That burden logically must also require the petitioner to show that the state court's treatment of every component of the claim was unreasonable. And so long as petitioner's reasons for challenging each component of a constitutional claim were fairly presented to the state court, a petitioner cannot meet his burden under AEDPA by pointing to a *mere possibility* that, for unexplained reasons, the state court might not have given any consideration at all to a particular component of a constitutional claim.

And even where a petitioner might show that the silent denial of a multi-component federal claim likely *did* rest solely on a single component, this still would be insufficient to nullify AEDPA deference. If the resolution of a multi-component claim, such as a *Strickland* claim, on one prong would be unreasonable, but it would be reasonable on the other prong, a federal court should not assume that the state court chose the unreasonable rather than the reasonable basis for its resolution.

4. Richter suggests that applying section 2254(d) deference to unexplained decisions would create a disincentive for state courts to render reasoned decisions. (RBOM at 41, 43.) But he unjustifiably assumes that state courts presently write reasoned decisions only in order to ensure section 2254(d) deference in later federal proceedings.

This assertion is overblown. As this Court has observed, state courts facing "overcrowded dockets" cannot be expected to explain their decisions in every case and are not "[ ] sufficiently motivated" to do so simply because of the specter of federal review. *Coleman*, 501 U.S. at 738-39. And, as the California Supreme Court has explained, its habeas corpus adjudications are not intended to insulate the decisions from federal review, but serve "quite different" state institutional goals of preserving the integrity of state appellate and collateral review practice. *In re Robbins*, 959 P.2d at 315 n. 1.

Furthermore, Richter's argument proves too much. Under his logic, no court should ever issue an unexplained decision because it cannot be reviewed. However, as already noted, courts issue unexplained decisions in a wide variety of contexts and those decisions are reviewed based on the record.

Similarly, although Richter advocates "reasoned decisions" for purposes of AEDPA review, he does not state how much reasoning is necessary, nor does he explain the degree or extent of explanation necessary for a state court decision to be reviewable under

AEDPA. There is no reason to conclude that Congress imposed such an uncertain requirement.

In sum, affording AEDPA deference to summary dispositions of federal claims is consistent with the statutory scheme and precedent. Richter's claim that only reasoned decisions should be afforded AEDPA deference should be rejected.

II. THE CALIFORNIA SUPREME COURT'S REASONABLE DENIAL OF RICHTER'S INEFFECTIVE-COUNSEL CLAIM PRECLUDES RELIEF

Properly viewed under 28 U.S.C. §2254(d), the record before the California Supreme Court reasonably supported its denial of Richter's ineffective-counsel claim under the clearly-established two-prong *Strickland* v. *Washington* test.[3] As this Court has explained, the *Strickland* standard is highly deferential to trial counsel, and federal review under section 2254(d) of a state court's *Strickland* ruling must be "doubly deferential." See *Knowles* v. *Mirzayance*, 556 U.S. ___, 129 S.Ct. 1411, 1420

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[3] It should be noted that the California Supreme Court did not have the benefit of Richter's counsel's federal court deposition testimony when it considered Richter's *Strickland* claim. However, because counsel revealed almost nothing about the reasoning behind his various tactical choices, the absence of this evidence from the state court record does not change the calculus for determining the reasonableness of the state court's denial of Richter's federal ineffective-counsel claim.

(2009); *Yarborough* v. *Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam). Under doubly-deferential review, the state court record supported a reasonable conclusion that counsel's performance was competent under prevailing professional norms. And, in any event, it reasonably supported a conclusion that it was not probable that the result of the trial otherwise would have been different.

A. The State Record Supported a Reasonable Conclusion that Defense Counsel's Performance was Not Deficient

The state record demonstrated that Richter's trial counsel confronted a daunting job. His client denied any involvement in murdering Patrick Klein. Yet there was very strong proof of his guilt, including incontrovertible physical evidence that Klein had been shot with two different guns; the discovery in Richter's house of bullets that matched the brand and caliber of the expended casing found near Klein's body; and eyewitness testimony of a surviving victim identifying Richter as one of the two perpetrators. Under the circumstances, counsel chose to attack the credibility of the drug-dealing survivor, and to exploit flaws in the prosecution's pretrial failure to analyze blood from the crime scene in support of an argument that Klein had been killed by crossfire while standing in the bedroom doorway. Counsel's defense theory was geared toward raising a reasonable doubt that Klein had been killed in the commission of a robbery or burglary and that Richter had either perpetrated or aided and abetted the commission of a robbery or burglary. Counsel's reliance on traditional cross-examination in these circumstances provides a reasonable basis for the conclusion that he acted competently; and thus shows that the California Supreme Court's rejection of Richter's ineffective-counsel claim was not "objectively unreasonable" under section 2254(d).

1. In contrast, both the Ninth Circuit and Richter assert that counsel's performance was deficient because he ignored the martial philosophy of Sun Tzu to prepare for "any" contingency by failing to consult with and present expert testimony to "eliminate[ ]" the prosecutor's theory that surviving victim Joshua Johnson rather than Klein was the source of the blood pool near the bedroom door, thus discrediting Johnson's testimony that Klein was shot on the living room couch. But the "clearly established law" of *Strickland* v. *Washington*, which governed the California Supreme Court's decision, does not require defense counsel to gird for just "any" contingency, but to make reasonable professional judgments about the limits of investigations. This Court has never held that defense counsel *must* consult with and/or present experts in every case in which expert opinion testimony could prove useful. Similarly, no opinion of this Court holds that defense counsel must invariably respond in kind to expert evidence presented by the prosecution rather than employ other, reasonably effective methods such as cross-examination. The

California Supreme Court's decision precludes habeas corpus relief because it was reasonable under *Strickland*. It need not have satisfied Sun Tzu.

2. Richter does not dispute the choice of trial counsel to defend his case on the theory that Klein was shot while at the bedroom door, as an unintended victim, when Johnson started shooting at Branscombe, whom he mistakenly thought to be an intruder. Instead, he disputes counsel's choice not to seek expert analysis of the blood pool in the bedroom door.

But the state court record reasonably supports the conclusion that Richter's counsel exercised reasonable professional judgment to limit the investigation of the blood pool. Counsel knew that the prosecution had not tested the blood prior to trial. And he had no incentive to ask the prosecution to test the blood, because such testing could have cured the ambiguities in the prosecution's investigation and probably would have produced damaging results by failing to reveal any evidence of Klein's blood. And counsel had reason to believe that forensic testing was potentially counterproductive because of the strong independent evidence of Richter's guilt. One of the bullets used to shoot Klein matched bullets found at Richter's house. Johnson's stolen property had also been found at Richter's. Finally, in light of various incriminating statements and post-offense guilty conduct, Richter's counsel had reason to believe his client was lying. *Strickland* recognizes that "when a defendant has given counsel reason to believe that

Klein's alleged contribution to the blood pool near the bedroom door was dwarfed by the compelling evidence that Richter had shot Klein in the living room during a robbery.

Richter presented no expert evidence that Klein's blood was, in fact, in the blood pool outside Johnson's back door. The supposedly "readily available evidence" consists exclusively of "expert" opinions that merely disagreed with the prosecution's experts on some relatively insignificant points.[4] And, as the dissent below noted, none of Richter's habeas corpus experts expressed an opinion challenging Detective Bell's testimony in regard to the blood stains on Klein's face[5] or the high-velocity spatter found near

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[4] Richter argues that, since Ken Moses's expert opinion clearly establishes that "the state's theory Johnson was the source of the blood pool could be 'eliminate[d],'" the only person whose blood could be in the pool was Klein. (RBOM at 56.) But the State has *never accepted* Mr. Moses's opinion as reliable, much less irrefutable. To the contrary, the State has uniformly challenged Moses's opinions throughout the state and federal court proceedings. Richter's claim (see RBOM at 57) that the State "stipulated to admission of Moses's expert conclusion without presenting any contrary testimony" misconstrues the substance of the stipulation. As Judge Bybee correctly noted, the State's stipulation "narrowly waive[d] only an objection to the admissibility of [Moses's declaration] in the district court in lieu of direct testimony for the purposes of considering Richter's habeas petition." (App.179a n. 14.)

[5] The detective testified that photographs of Klein on the couch showed "a blood flow pattern emanating from the area of his eye and nose down the left side of his face in the area of the temple down into the hairline." (RT at 145.) Bell said this

(Continued on following page)

Klein's body. App.186a. This evidence, which Richter's experts have never disputed, clearly shows that *someone* was shot on or very near the couch.[6]

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pattern of drained blood was important because "it does not show any significant movement up or down." (*Id.*)

[6] Richter asserts that the State erroneously claimed in its opening brief that there was "high-velocity blood spatter on the wall by the couch" where Klein lay mortally wounded. (RBOM at 57-58.) But Richter ignores the most compelling aspect of the blood spatter expert's testimony: his opinion that, based on the lack of any trail of blood leading from the pool of blood near the bedroom door to the couch, Klein could not have made the blood pool by falling to the floor after having been shot. As Detective Bell testified, when a person is shot and there is a corresponding exit wound, there is typically "exit spatter of the bullet as it exits, . . . " (RT at 148.) In this case, however, both bullets that struck Klein lodged in his body and were recovered at autopsy. (RT at 272 75, 277-78.) Bell testified that because "[t]here are no exit wounds to Patrick Klein, . . . what we are dealing with here is back spatter." (RT at 147.) The detective said that he observed atomized blood on a plastic bag and on a piece of paper in the area where the expended casings were found in the living room. (RT 149.) These minute particles of blood, Bell said, could have been caused by blood spattering when Klein was shot in the eye. (RT at 150.) Detective Bell said that "because of that high velocity spatter that we had deposited on that in that area, I don't know what other action could have occurred." (RT at 151-52.)

The detective also testified that, in his opinion, the blood spatter near the couch was inconsistent with Klein having been shot near the bedroom door. As Bell said, if Klein had been shot and had fallen straight to the floor, "I still don't have an explanation for the high-velocity spatter near the couch." (RT at 153.) None of Richter's habeas experts, including Ken Moses, has ever addressed, much less refuted, Bell's testimony on this point.

Further, the proffered expert opinions did not explain how Klein could have been shot in the bedroom doorway even though his body was found on the living room couch. They did nothing to advance the implausible defense scenario that "the drug-addled, intoxicated, 5'10", 155 pound Johnson [c]ould have [performed] an athletic feat of nearly Olympic proportions [by moving] Klein from the bedroom doorway to the couch" without leaving any smears or a trail of blood. App.186a-187a. Richter's blood-spatter expert and pathologist conveniently side-stepped this issue by contending that *the prosecutor's claim*, that Johnson alone caused the blood pool while waiting for the arrival of the police, is "scientifically unreliable." But, as Judge Bybee pointed out, all Richter's experts' opinions mean is "that the blood couldn't have originated from Johnson while he was standing up." App.188a.

In any event, none of Richter's proffered expert testimony undermined the most salient evidence directly tying Richter to the murder of Klein—the .22-caliber casing that exactly matched live bullets found in a box and loaded in a magazine for a semi-automatic pistol found in Richter's bedroom shortly after the murder.

Nor did the "expert" evidence undercut the evidence that Richter committed the robbery, and was not just sitting outside Johnson's home in his truck. That evidence showed that Johnson's stolen gun safe and backpack also were found at Richter's home.

In departing from the "doubly-deferential" review under *Strickland* and section 2254(d), the Ninth Circuit got the question of whether the state court's adjudication was "reasonable"—"the only question that matters"—wrong. See *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003). Habeas corpus relief, therefore, is barred under section 2254(d).

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: August 23, 2010

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-587

In The
Supreme Court of the United States

◆

KELLY HARRINGTON,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF FOR CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The California Attorneys for Criminal Justice (CACJ) and the California Academy of Appellate Lawyers (Academy) respectfully submit this brief as *amici curiae* in support of respondent Joshua Richter.

CACJ is a non-profit corporation founded in 1972. It has over 2,000 members, primarily criminal defense lawyers. CACJ members have extensive experience in habeas corpus litigation in the California and federal courts. One of the principal purposes of CACJ, as set forth in its By-laws, is to defend the rights of individuals guaranteed by the United States and California Constitutions. Federal habeas corpus is essential to safeguard those rights. CACJ members are gravely concerned that if the State's arguments about 28 U.S.C. §2254(d) are accepted, a petitioner who has filed a proper and timely state habeas corpus petition – but who has not received a ruling on the merits of the petition in state court – will nevertheless be accorded only limited federal review under §2254(d). In addition to offering the views set forth here, CACJ agrees with respondent and the National Association of Criminal Defense

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

Lawyers that §2254(d) should not apply to unexplained state-court decisions.

The Academy is a non-profit organization also founded in 1972. Its members are California lawyers with substantial appellate experience, who are elected to membership after rigorous scrutiny of their skills as appellate advocates. Most members are civil law practitioners, although some members practice criminal law. The goals of the Academy include the promotion of sound appellate procedures that are designed to ensure proper and effective representation of litigants and the efficient administration of justice at the appellate level. Academy members are extremely concerned that a deleterious burden would be placed on the already-overworked California Supreme Court if its silent denials in habeas cases are treated as adjudications on the merits under 28 U.S.C. §2254(d).

CACJ and the Academy offer their expertise to explain the history and meaning of a silent habeas corpus denial in the California Supreme Court. Whatever the practice in other jurisdictions, a silent habeas denial in the California Supreme Court is not an adjudication on the merits. Rather, it reflects the justices' considered judgment that a petition cannot be decided "on the merits" or on procedural grounds. We urge this Court to respect their judgment. This Court should not seek to defer to a state court decision that was in fact never made.

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SUMMARY OF ARGUMENT

The respondent, Joshua Richter, presented his federal claim to the California Supreme Court in a habeas corpus petition, which was summarily denied without any citations or explanations. This Court granted certiorari and added the question whether "AEDPA deference" applies to a state court's summary disposition of a claim. Under the language of the Antiterrorism and Effective Death Penalty Act, the precise question is whether a summary denial constitutes an adjudication "on the merits" within the meaning of 28 U.S.C. §2254(d). As we explain, whether a state court decision is "on the merits" can only be answered by reference to state law. And under California law, the particular form of habeas corpus denial in Richter's case – a silent denial that was not explained by any state court – is not a decision on the merits.

The California Supreme Court now handles over 10,000 cases each year, including well over 3,000 original petitions for writs of habeas corpus. The petitions are decided at the court's conferences, where the justices consider approximately 250 matters each week. The seven justices of the court sit en banc and do not vote issue-by-issue. To handle its heavy workload, the court denies many habeas cases with summary orders.

Over the last four decades, through an extended dialogue with the federal courts, the California Supreme Court has developed certain summary order practices. When a majority of the state high court is able to agree on a basis for denying a petition, it says so. The Court expressly denies some habeas petitions on procedural grounds, some "on the merits" and some for both reasons. But when a majority does not agree on a basis for decision, the court simply denies the petition without any citation or explanation at all. The court entered this sort of "silent denial" in Richter's case. As this Court previously recognized in *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." A silent denial says "absolutely nothing about the reasons for the denial" (*id*. at 805), although in many if not most cases a federal court will be able to "look through" a silent denial to the last-reasoned decision of a lower state court.

Under state law and §2254(d), a silent denial is different from a decision "on the merits." This Court should respect the habeas practices of the California Supreme Court, which carefully distinguish among different forms of summary orders. The values of comity and federalism are furthered by respecting these distinctions. This Court should not attempt to fashion a per se, one-size-fits-all federal rule that treats all summary orders identically given that state practices differ, there is no empirical basis for a uniform rule, and the evidence of California's practice indicates that various summary orders carry unique meanings. Finally, creating a per se rule would inhibit the ability of the California Supreme Court to manage its heavy workload because the conscientious court would be forced to devote significant additional resources to its habeas corpus docket.

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ARGUMENT

A SILENT DENIAL IN THE CALIFORNIA SUPREME COURT IS NOT AN ADJUDICATION ON THE MERITS UNDER STATE LAW OR 28 U.S.C. §2254(d)

A. The California Supreme Court Has a Heavy Workload and Denies Most Habeas Corpus Petitions With Summary Orders

The California Supreme Court is the highest court of the largest state in the nation. In 2000, the year before the state court denied Richter's habeas petition, California had 33.8 million people,[2] and 2,018 appellate justices and trial judges presided over their litigation.[3] The California Supreme Court

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[2] U.S. Census Bureau, *Census 2000 Data for the State of California*, http://www.census.gov/census2000/states/ca.html.

[3] For fiscal year 2000-2001, there were 7 Supreme Court justices, 105 authorized justices for the courts of appeal, and 1906 "judicial positions" in the trial courts (which included judges, commissioners and referees). *See* Judicial Council of California, *2002 Annual Report, Court Statistics Report* 18,

(Continued on following page)

oversees this extensive judicial system and has a heavy docket of its own. In 2000-01, the court decided over 9,000 cases. Not surprisingly, given this workload, the court issues summary dispositions in most of its habeas corpus cases.

1. The duties of the California Supreme Court are substantial and varied. The state supreme court, like the courts of appeal and superior courts, has "original jurisdiction in habeas corpus proceedings" as well as "in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Cal. Const. art. VI, §10. Although most habeas corpus petitioners first file in the lower courts, habeas matters in the California Supreme Court are generally original petitions. If a court of appeal denies habeas relief, the typical remedy is to file a new, original petition in the California Supreme Court (*see, e.g.*, *In re Catalano*, 29 Cal.3d 1, 7, 623 P.2d 228, 232 (1981)), although a petitioner who is denied relief in the court of appeal may choose to file a "petition for review" in the California Supreme Court instead. *See Carey v. Saffold*, 536 U.S. 214, 223-25 (2002).

In addition to original proceedings, the Supreme Court has jurisdiction to review the decisions of the intermediate courts of appeal. Cal. Const. art. VI, §12 subd. (b). As a court of limited jurisdiction, a substantial part of the work of the state high court

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39 ("*2002 Court Statistics Report*") available at http://www.courtinfo.ca.gov/reference/documents/csr2002.pdf.

consists of determining which cases it will review. "In exercising its discretion, the Supreme Court reviews cases that will enable it to settle important legal questions of statewide concern and to ensure that the law is applied uniformly throughout the state." *The Supreme Court of California* (2007 ed.), available at http://www.courtinfo.ca.gov/courts/supreme/documents/2007_Supreme_Court_Booklet.pdf, at 19. The court typically grants 5% or fewer of the petitions for review presented each year. *Id.* at 21.

The California Supreme Court also has exclusive appellate jurisdiction over death judgments and must review each one. Cal. Const. art. VI, §11; Cal. Pen. Code §1239(b); *People v. Massie*, 19 Cal.4th 550, 566-71, 967 P.2d 29, 39-43 (1998). Its appellate jurisdiction further extends to decisions of the Public Utilities Commission (Cal. Pub. Util. Code §§1756, 1759) and bar discipline matters. *See* Cal. Bus. & Prof. Code §§6082, 6084.

Consistent with its substantial responsibilities, the California Supreme Court has a large and growing docket. In fiscal year 2000-01, the court determined 9,047 cases with 103 written opinions, and by fiscal year 2007-08, the last year for which data is available, the number rose to 10,440 dispositions with 116 written opinions. Judicial Council of California, *2009 Court Statistics Report*, available at http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf, at ix, 4 (tbl. 1), 9 (tbl. 6).

A breakdown of the California Supreme Court's dispositions helps place its habeas docket in context. Of the 9,047 dispositions by the state high court in fiscal year 2000-01, there were 5,772 petitions for review, 2,645 original proceedings, 27 habeas petitions related to automatic (capital) appeals, and 592 state bar matters. *See 2002 Court Statistics Report*, at 4 (tbl. 1). The original proceedings included 2,425 non-capital habeas corpus petitions, such as Richter's, which comprised 92% of the dispositions in all original proceedings and 27% of the court's total dispositions. *Id.* at 4 (tbl. 1), 6 (tbl 3).[4] By 2007-08, the number of non-capital habeas dispositions rose to 3,476, which was 91% of the 3,833 dispositions in original proceedings, and 33% of all 10,440 dispositions that year. *2009 Court Statistics Report* at ix, 4 (tbl. 1), 6 (tbl. 3). The court also ruled on 5,989 petitions for review, which included 784 habeas corpus matters. *Id.* at 5 (tbl. 2).

2. The California Supreme Court sits en banc in all cases, and disposes of most original habeas petitions by summary orders. The seven members of the court meet in regular Wednesday conferences to decide whether to grant petitions for review or to

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[4] Looking back further, non-capital habeas petitions more than tripled in the last decade and a half. In 1991-92, non-capital habeas petitions comprised 1,032 – or 76% – of the high court's 1,358 dispositions in original proceedings and 19% of the 5,466 total dispositions. *2002 Court Statistics Report* at 4 (tbl. 1), 6 (tbl. 3).

issue orders to show cause in habeas corpus cases. *Internal Operating Practices and Procedures of the California Supreme Court*, §§III, XIV.F (rev. 2007), available at http://www.courtinfo.ca.gov/courts/supreme/documents/iopp07.pdf. When a non-capital habeas corpus petition is filed, the court schedules a conference date and assigns the case to the court's criminal central staff to prepare a conference memorandum and recommend a disposition. *Id.*, §IV.B.3. "At a typical conference, the justices consider approximately 250 matters. The concurrence of at least four justices is needed for a decision to review a case or take other action." *The Supreme Court of California* at 20.[5]

Given its heavy docket of original habeas petitions and other matters, the California Supreme Court has developed procedures for ruling on a habeas petition without issuing a written decision that states its reasons. Under California law, an order to show cause why a writ should not issue formally creates a "cause" in a habeas case (*People v. Romero*, 8 Cal.4th 728, 740, 883 P.2d 388, 393 (1994)), and makes applicable the state constitutional requirement that decisions of the state supreme court be "in writing with reasons stated." Cal. Const. art. VI, §14.

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[5] The same procedures were in place in 2001 when Richter's petition was denied. *See* West's California Rules of Court (2001 ed.) at 625, 629 (*Internal Operating Practices and Procedures of the California Supreme Court* §§III, IV.B.2, XIV.F).

However, the court may deny a petition outright "[i]f the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred . . . ." *Romero*, 8 Cal.4th at 737, 883 P.2d at 391. Such dispositions are "commonly referred to as 'summary denials'" (*id.*), and do not require a written opinion because the habeas petition has not resulted in a "cause." *Id.*, 8 Cal.4th at 740, 883 P.2d at 393.[6]

Original habeas corpus petitions filed in the California Supreme Court are overwhelmingly denied through summary orders, without written opinions, under this procedure. While the Judicial Council does not publish statistics for summary denials, "alternative writs or orders to show cause" were issued in only 9 of 2,640 (0.34%) original proceedings disposed of in 2000-01; in 2007-08, such orders were entered in only 11 of 3,816 (0.29%) such cases. *See 2009 Court Statistics Report* at 9 (tbl. 6). And, as we have noted, only 103 and 116 opinions were issued in 2000-01 and 2007-08, respectively.

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[6] The petition "serves primarily to launch the judicial inquiry into the legality of the restraints on the petitioner's personal liberty." *Romero*, 8 Cal.4th at 738, 883 P.2d at 392. If an order to show cause issues, the custodian's return becomes the principal pleading, and "it is through the return and the petitioner's traverse that the issues are joined . . . ." *Id.*, 8 Cal.4th at 739, 883 P.2d at 392.

B. A Silent Denial – Like Other Summary Habeas Orders – Accommodates the California Supreme Court's Heavy Workload and Facilitates Later Federal Review, But is Not a Decision on the Merits Under State Law

Although the heavy workload of the California Supreme Court necessitates the use of summary dispositions, that court has conscientiously sought to assist the federal courts by indicating – when it is able to do so – which of its summary denials are on procedural or other grounds that may affect later federal review. The California Supreme Court is well aware of federal habeas corpus doctrine; its summary order practices have developed in light of federal habeas law, and its use of particular language to accompany certain denials is quite deliberate. The California Supreme Court also depends upon the federal courts to interpret its language consistently so that the court may continue to communicate accurately through its summary process. Through a series of decisions, the federal courts have made plain that there is a shared federal-state understanding of the meaning of different forms of summary denials, including silent denials.

1. For decades, the California Supreme Court has issued summary denials in habeas corpus cases. The state high court's longstanding practice was to mail summary orders on postcards, and so they were often called "postcard denials." *See Harris v. Superior Court*, 500 F.2d 1124, 1125 (9th Cir. 1974) (en banc),

cert. denied, 420 U.S. 973 (1975). At the outset, postcard denials contained no explanations for the court's decisions. This caused some consternation in the federal courts; the Ninth Circuit criticized the "failure of the California court to reveal the basis of its denial . . . ." *Castro v. Klinger*, 373 F.2d 847, 850 (9th Cir. 1967).[7] In 1969, the California Supreme Court began citing cases or other authorities when a majority of the court was able to agree upon the basis for a postcard denial. *See Harris*, 500 F.2d at 1127-28.[8] That practice still continues. *See infra* at 20-21.

Although the state supreme court endeavors to provide a citation or basis for decision when it can, court procedures do not ensure that a majority of the justices will agree on a reason to deny a petition. As noted, a majority of four justices must concur in the disposition to decide any matter, including a habeas petition, at the court's conferences. *See Internal Operating Practices and Procedures of the California Supreme Court*, §§III.F, IV.B.3, IV.J (rev. 2007). Thus, even though the California Supreme Court affirmatively indicates the bases for its decisions in a large number of cases, at times the court is simply unable to indicate that a majority of justices has agreed upon a reason for denial. In these circumstances, the justices will issue a summary order without any explanation – a silent denial.

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[7] *See also A Study of Postconviction Procedures in California*, *reprinted in* Judicial Council of California, *1971 Annual Report to the Governor and the Legislature* 23, 38-41 (1971) (describing need for state courts to make a record when denying habeas relief for reasons including facilitating later federal review).

[8] *Compare, e.g.*, Minutes of the California Supreme Court, June 19, 1968 (entering summary orders in 35 original habeas corpus petitions; the court issued 2 orders to show cause, denied 1 petition relating to bail on appeal, and denied 36 petitions with only the following language: "Petition for writ of habeas corpus denied") *with* Minutes of the California Supreme Court, Dec. 7, 1970, reprinted in 35 Cal. Official Reports (1970) (summarily denying 33 original habeas corpus petitions, but citing authority in 19 of the denials).

These summary order practices permit the California Supreme Court to manage a large docket of original habeas proceedings (as well as the rest of its substantial workload) and, at the same time, communicate effectively to the federal courts when the majority of the justices is able to agree on the basis for a summary denial. Changing these procedures, such as by requiring the justices to vote "issue by issue" – instead of just voting upon the disposition of a petition – would come at a high cost for a court that regularly decides 250 matters at its weekly conferences, and that rules on at least 3,400 original habeas corpus petitions each year.

There is a direct relationship between the California Supreme Court's habeas practices and its ability to do the rest of its work. Judges of the Ninth Circuit once asked the state high court to consider issuing even more detailed findings in capital habeas orders which, unlike non-capital habeas orders, do state reasons for denying each claim in the petition.[9] Chief Justice Ronald M. George later told the circuit that the court conducted an internal experiment and found that employing different procedures diverted resources that would otherwise have produced opinions in civil and non-capital criminal matters. The justices "concluded that the costs of issuing such orders would substantially outweigh any benefits and hence preclude our departing from our historical, and current, practice of issuing orders that announce the disposition (invoking, of course, as appropriate both the merits and any procedural bars)."[10]

2. Although the California Supreme Court's summary disposition procedures were born of necessity, they have evolved through an extended dialogue with the federal courts. The federal courts in California and this Court have demonstrated their understanding of summary habeas denials – including silent denials – and this shared understanding allows the state supreme court to use summary orders with confidence.

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[9] *See, e.g., In re Robbins*, 18 Cal.4th 770, 822-24, 959 P.2d 311, 346-47 (1998). From 1998-2008, the California Supreme Court decided an average of 29 capital habeas petitions annually. *See 2009 Court Statistics Report* at 4 (tbl. 1).

[10] *Streamlined Procedures Act of 2005, Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 140 (2005) (reprinting letter from Chief Justice Ronald M. George to Chief Judge Mary M. Schroeder).

An early part of the conversation took place as the federal courts were determining whether a federal habeas petitioner who received a postcard denial had exhausted her state remedies, as a summary denial might be based upon procedural grounds. Prior to the Antiterrorism and Effective Death Penalty Act (AEDPA), amending 28 U.S.C. §§2241, *et seq.*, the only issue for the federal courts regarding a silent denial was whether it represented a decision on procedural grounds, and courts split on this question. *Compare Castro*, 373 F.2d at 850 (finding exhaustion) *with Baskerville v. Nelson*, 455 F.2d 430, 432 (9th Cir. 1972) (per curiam) (finding no exhaustion). In *Harris*, the en banc court of appeals held:

> If the denial of the habeas corpus petition includes a citation of an authority which indicates that the petition was procedurally deficient or if the California Supreme Court so states explicitly, then the available state remedies have not been exhausted . . . However, when the California Supreme Court denies a habeas corpus petition without opinion or citation, or when it otherwise decides on the merits of the petition, the exhaustion requirement is satisfied.

Harris, 500 F.2d at 1128-29 (citations omitted). *Harris* thus resolved the exhaustion issue for the federal district courts in the state, and made clear to the California Supreme Court that silent denials would not be interpreted by the federal courts as based on procedural grounds.

More recently, and after AEDPA, the California Supreme Court has participated directly in the conversation with the federal courts about the meaning of its summary denials, and has even modified its practices. Since federal courts will not review a state decision containing a "plain statement" that it relied upon an adequate and independent state ground (*Harris v. Reed,* 489 U.S. 255, 265 (1989)), the California Supreme Court has given the federal courts a clear explanation of its summary order practices. In *In re Robbins*, 18 Cal.4th 770, 814 n. 34, 959 P.2d 311, 340 n. 34 (1998), the court described various aspects of its habeas order practices "in order to provide guidance." It first explained:

> We deny a claim "on the merits" when we conclude, after review, that no prima facie case for relief is stated as to that claim. In so doing, we understand that federal courts will honor independent and adequate state procedural bars even if the state court's procedural disposition is accompanied by an alternative disposition on the merits grounded upon federal law.

Id. (citing *Harris*, 489 U.S. at 264). The court then detailed how it cites to prior cases and applies the four primary grounds for state procedural default: the *Dixon* bar (the claim should have been raised on appeal), the *Waltreus* bar (the claim was already rejected on appeal), and the untimeliness and successor bars. *Id.*

The Ninth Circuit in turn has demonstrated its understanding of these signals, including the state court's shorthand references for these state procedural bars. *See, e.g. Thorson v. Palmer*, 479 F.3d 643, 645 (9th Cir. 2007) (reading a summary order's citation to "the very page of *Robbins* that sets forth 'the basic analytical framework' governing California's timeliness determinations in habeas corpus proceedings" as "a clear ruling that Thorson's petition was untimely"); *Jackson v. Roe*, 425 F.3d 654, 657, n. 2 (9th Cir. 2005) (reading a summary order citing only to *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953) as based on procedural bar precluding habeas claims that could have been, but were not, raised on direct appeal); *Washington v. Cambra*, 208 F.3d 832, 833-34 (9th Cir.) (reading a summary denial citing *In re Swain*, 34 Cal.2d 300, 304, 209 P.2d 793 (1949) and *Dixon* as resting on procedural bars of untimeliness and failure to raise the claim on appeal), *cert. denied*, 531 U.S. 919 (2000).

This Court too has participated in the dialogue between the federal and California courts, stepping in on two occasions where the Ninth Circuit has misread summary orders and silent denials. In *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), this Court correctly stated that "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." The silent habeas denial by the California Supreme Court in *Ylst* "said absolutely nothing about the reasons for the denial." *Id.* at 805.[11] The Court then "looked through" the California Supreme Court's silent denial to the last-reasoned state court decision, and found that the habeas petitioner's claim was procedurally defaulted. *Id.* at 805-06. *Ylst* communicated two messages to the California Supreme Court: first, it reassured the state high court that unexplained denials would continue to be treated as not setting forth any basis for decision; and, second, it made clear that unless the court chose to couple a habeas denial with an explanation, federal courts could "look through" to the last-reasoned state court ruling.

This Court weighed in again post-AEDPA, issuing a decision that reinforced this settled understanding about summary orders and silent denials. In

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[11] In their briefing in that case, the State and its *amicus* both argued that a silent denial is not a decision on the merits, and thus that the federal courts should look to the last-reasoned state decision. *See* Closing Brief for Petitioner, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (No. 90-68), 1991 U.S. S.Ct. Briefs LEXIS 719, *36 ("the state supreme court is composed of seven justices, each of whom may have a different reason for denying relief. For example, two may reject the claim on the merits, two may determine that the claim was not stated with sufficient particularity and three may decide that the petitioner should have raised the issue on appeal."); Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (No. 90-68), 1990 U.S. S.Ct. Briefs LEXIS 627, *39-*40 (arguing that a summary denial "stands for nothing more than the fact that the California Supreme Court did not believe that the case warranted supreme court review.")

Evans v. Chavis, 546 U.S. 189, 198 (2006), this Court could not tell from a silent denial whether the California Supreme Court ruled on the merits or denied the petition as untimely. Arguing for this holding, the California Attorney General quoted *Ylst* to point out that "[t]he essence of unexplained orders is that they say nothing." Petitioner's Brief on the Merits, *Evans v. Chavis*, 546 U.S. 189 (2006) (No. 04-721), at 25 (quoting *Ylst*, 501 U.S. at 804).

A shared state-federal understanding of the California Supreme Court's habeas practices thus has been made explicit by the courts: silent denials communicate nothing, but if the California Supreme Court is able to specify the basis for a summary order, that specification will be given effect. Two decades after *Harris v. Superior Court*, the Ninth Circuit observed that the state high court, which had issued an unexplained denial, "had good reason to know the effect it would be given in federal court." *Hunter v. Aispuro*, 982 F.2d 344, 347 (9th Cir. 1992), *cert. denied*, 510 U.S. 887 (1993). Likewise, after *Ylst v. Nunnemaker* and *Evans v. Chavis*, the California Supreme Court also has had good reason to know how silent denials would be treated by the federal courts, and the state high court has continued to issue them with confidence as to how they would be received.

3. The California Supreme Court's summary adjudication procedures were firmly established when Richter's habeas corpus petition was denied, and they remain so today. The court denies habeas petitions with four distinct types of orders. These four

categories were in use in 2000-01, and they continue to be employed today.

a. First, some orders indicate that the petition is unmeritorious (*In re Robbins*, 18 Cal.4th 770, 814 n. 34, 959 P.2d 311, 340 n. 34 (1998)) and these orders explicitly state: "Petition for writ of habeas corpus is DENIED on the merits." *In re Gerkin*, No. S092534, 2001 Cal. LEXIS 3638 (2001); *see also In re Luna*, No. S181847, 2010 Cal. LEXIS 5894 (2010) (same).

b. Second, some orders deny the petition on a procedural ground without considering its merits (*Robbins*, 18 Cal.4th at 778 n. 1), and these orders cite the case or cases setting forth the applicable procedural rule. An example is: "Petition for writ of habeas corpus is DENIED. (*See In re Clark* (1993) 5 Cal.4th 750, 866 P.2d 729; *In re Waltreus* (1965) 62 Cal.2d 218, 225, 42 Cal.Rptr. 9, 397 P.2d 1001.)" *In re Le*, No. S094971, 2001 Cal. LEXIS 3694 (2001); *see also In re Leon*, No. S178772, 2010 Cal. LEXIS 5283 (2010) (citing other procedural bars).

c. Third, some orders deny the petition both on a procedural ground and "on the merits" (*Robbins*, 18 Cal.4th at 814 n. 34), stating, for example, "Petition for writ of habeas corpus is DENIED on the merits and as successive." *In re Pierce*, No. S091769, 2001 Cal. LEXIS 701 (2001); *see also In re Slade*, No. S146027, 2007 Cal. LEXIS 3736 (2007) (denying petition on the merits and for lack of diligence).

d. Fourth, some orders, as in Richter's case, are wholly silent; they deny the petition without identifying any grounds whatsoever. For example: "Petition for writ of habeas corpus is DENIED." *In re Zetino*, No. S091126, 2001 Cal. LEXIS 574 (2001); *see also In re Pedraza*, No. S179142, 2010 Cal. LEXIS 5791 (2010) (same).

4. Finally, although the silent denial is the only summary disposition that reveals nothing about its reasons, on federal habeas review, many, if not most, of the silent denials issued by the California Supreme Court are "look through" orders under *Ylst*.

Under California's unique habeas procedure, the superior courts, the courts of appeal, and the supreme court all have original jurisdiction over a petition for writ of habeas corpus. Cal. Const. art. VI, §10. Although a habeas petitioner may file his initial petition in the California Supreme Court without initially seeking relief in the lower courts (*see, e.g.*, *In re Harris*, 5 Cal.4th 813, 824, 855 P.2d 391, 395 (1993)), he must plead whether he previously filed the same claim in another court, provide detailed information about any prior petition, and explain the circumstances justifying his application in an appellate court rather than in the lower court. Cal. R. Ct., rules 8.380(a)(1), 8.384(a)(1) & 8.384(b)(1)-(2); Judicial Council form MC-275, p. 6, # 12-14, 18. Moreover, when a habeas petition is filed in the superior court, any order denying the petition must be in writing and "contain a brief statement of the reasons for the denial. An order only declaring the petition to be 'denied' is insufficient." Cal. R. Ct., rule 4.551(g). With these facts before it, an appellate court has discretion, but is not required, to deny an original petition that was not filed first in a lower court. *In re Steele*, 32 Cal.4th 682, 692, 85 P.3d 444, 449 (2004). This Court already has recognized that "California's habeas rules lead a prisoner ordinarily to file a petition in a lower court first." *Carey v. Saffold*, 536 U.S. at 221 (citations omitted).[12] Given this state procedure, it is reasonable to expect that for a majority of California silent denials, the federal courts will be able to "look through" to a reasoned decision based on a procedural bar and/or on the merits; silent denials with no lower court order to consider under *Ylst*, like Richter's, are the exception.

As this discussion shows, the California Supreme Court's summary disposition practices developed in light of decisions from the federal courts, including this Court's opinion in *Ylst*. Summary denials are a necessity for the state high court given its workload. The habeas procedures and the four categories of denial orders have been refined through an iterative process in which the state court has sent signals through the careful use of language accompanying its summary denials, and the federal courts have reassured the California Supreme Court that its signals are understood. The California Supreme Court's choice of a particular type of order denying a habeas corpus petition is calculation, not coincidence. It reflects a reasoned decision, and each type of order has a distinct meaning, as the federal courts have consistently recognized. Under this considered system, a silent denial is not a denial on the merits.

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[12] Statistics published by the California Judicial Council tend to confirm this Court's understanding that habeas petitioners usually file first in the lower courts in California. For example, in fiscal year 2000-01, when the California Supreme Court decided 2,425 original non-capital habeas petitions, including Richter's, the California superior courts decided 5,121 habeas petitions. *2002 Court Statistics Report* at 57 (tbl. 13). During the last decade, the number of habeas petitions determined by the superior courts has increased steadily to 7,301 in fiscal year 2007-08. *See 2009 Court Statistics Report* at 57 (tbl. 11). Similar data on the number habeas dispositions in the courts of appeal are not available. *See 2002 Court Statistics Report* at 25 (tbl. 5) (reporting a total of 9,096 dispositions in original proceedings without separately identifying criminal habeas petitions).

C. A Silent Denial is Not an Adjudication "On the Merits" Within the Meaning of §2254(d)

With this clear and well-settled summary order practice, a silent denial from the California Supreme Court cannot be an adjudication "on the merits" within the meaning of 28 U.S.C. §2254(d). There are at least three reasons why. First, considering a silent denial to be a decision "on the merits" would obliterate the state-law distinctions between different forms of summary denials, and fail to respect the state court's decisional process. Second, this Court should not apply a single, inflexible federal standard to assess the state courts' judgments. Third, construing a silent denial to be a decision "on the merits" within the meaning of §2254(d) would impede the work of the California Supreme Court because that busy court would have to expend additional time and resources on petitions that it already has decided to deny.

1. To begin, there appears to be no dispute among the parties in this case that state law controls whether a state court decision is an adjudication "on the merits." The State asserts that the silent denial here was a decision on the merits, but urges that conclusion as a matter of California law. *See* Petitioner's Brief on the Merits at 22. Respondent agrees that state law controls. *See* Respondent's Brief on the Merits at 17.

This is wholly consistent with the way this Court has addressed the intersection of state procedural rules and habeas corpus provisions. Thus, in *Evans v. Chavis*, 546 U.S. at 199-200, the Court looked to the California courts and legislature for guidance to determine whether a state habeas petition was timely filed, because AEDPA's statute of limitations is tolled while such a petition is pending. And state law also informs whether the federal claim has been exhausted and may be reviewed in federal court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (under the exhaustion doctrine, a petitioner must present his claims in a petition for discretionary review to the state supreme court, when such opportunity is provided by state law, before filing his petition for federal habeas relief); *Cone v. Bell*, 129 S.Ct. 1769, 1780 (2009) (under the procedural default doctrine, state court's refusal to adjudicate a claim because a petitioner failed to raise his federal claims in compliance with a relevant, adequate and independent state procedural rule ordinarily bars federal habeas review).

Although the State would look to state law to determine whether an order represents an adjudication on the merits, it overlooks the different forms of summary denials in the California Supreme Court. Of course, a habeas denial with a citation to a procedural bar indicates that at least four justices voted to deny the petition on state procedural grounds. But the fact that four justices did not vote to deny the petition on state procedural grounds does not mean that four justices denied the petition "on the merits." There are procedural denials; there are denials "on the merits" – when a majority of the California Supreme Court expressly uses that language; there are denials both "on the merits" and for procedural reasons; and then there are silent denials for which there is no discernible basis for the state high court's decision. As we have shown, the summary order practices of the California Supreme Court have not changed since this Court decided *Ylst v. Nunnemaker* and *Evans v. Chavis*. A silent denial still means that there was no basis for decision that commanded four votes.

If this Court accepts the State's argument in this case, it will conflate denials "on the merits" with silent denials, effectively erasing the careful distinction made by the California Supreme Court. But state law should control whether a silent denial is an adjudication on the merits. Disrespecting the state court's measured judgment would not serve "AEDPA's goal of promoting 'comity . . . and federalism . . . .'" *Carey v. Saffold*, 536 U.S. at 220 (quoting *(Michael) Williams v. Taylor*, 529 U.S. 420, 436 (2000)); *see also Panetti v. Quarterman*, 551 U.S. 930, 945 (2007). As noted in *Williams*,

> Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to . . . safeguard the States' interest in the integrity of their criminal and collateral proceedings.

Id., 529 U.S. at 436.

Over the last forty years, the California Supreme Court has developed summary order procedures for habeas corpus cases. The state high court has decided to issue four types of summary orders, not three, and each category has a well-established meaning and purpose. If this Court holds that silent denials are the same as denials expressly "on the merits," it will attribute a meaning to silent denials that was in no way intended by the California Supreme Court, and ignore state law. This Court instead should safeguard the state court's interest in the integrity of its collateral proceedings, and respect the considered judgment of the California Supreme Court.

2. Nor should this Court attempt to create a one-size-fits-all federal standard. There is insufficient evidence about summary dispositions in the states to permit this Court to fashion a rule that will accurately reflect and respect the variations in state practices.

Texas and several other states have argued that summary rulings should be treated as adjudications on the merits. Although their *amici* brief indicates that a number of states issue summary orders in habeas corpus cases, their brief does not supply evidence as to which of those summary orders are in fact on the merits and which are not. *See generally* Brief of Texas et al. as Amici Curiae in Support of Petitioner. There is no empirical evidence to support the per se rule sought by *amici*. Indeed, the only clear evidence we have about summary denials and merits adjudications counsels *against* the creation of a per se rule. We already have demonstrated that silent denials in California cannot be considered "on the merits." And in its brief, Texas provides a specific explanation of its own practices, noting that "Texas courts use terms of art to indicate the nature of their decisions," with a "denial" signifying a merits disposition and a "dismissal" indicating a ruling unrelated to the merits. *Id.* at 14 n. 1. Even Texas employs at least two different forms of summary orders and only one is arguably related to the merits.

Thus, even if this Court were to seek to craft a federal presumption or rule treating summary orders as adjudications "on the merits," this Court can have no confidence that such a rule would accurately capture the variety of summary order practices in the fifty states. As this Court held in *Coleman v. Thompson*, 501 U.S. 722 (1991), "[*p*]*er se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter . . . ." *Id.* at 737. While "[w]e accept errors in [a] small number of cases . . . in exchange for a significant reduction in the costs of inquiry . . . , [t]he tradeoff is very different when the factual predicate does not exist." *Id.* A presumption or per se rule certainly would not accurately capture the practices of California, the nation's most populous state, and we do not know how it would fare with respect to other states.

Amici argue that denying "AEDPA deference" to summary dispositions would fail to promote comity, finality and federalism (*see* Brief of Texas et al. as Amici Curiae in Support of Petitioner at 13-19), but in truth the reverse is true. Constructing a blunt federal rule, one that fails to account for variations among the states, would offend and not further the values of comity and federalism.

3. Finally, adopting the rule urged by the State here would interfere with the ability of the California Supreme Court to manage its heavy caseload. As already noted, the California Supreme Court is an extraordinarily busy tribunal. It has appellate jurisdiction in capital and other appeals. And in 2007-08, the last reported year, it entered orders in 3,476 non-capital habeas corpus cases. *See 2009 Court Statistics Report* at 6 (tbl. 3).

If this Court rejects the settled meaning of a silent denial, a conscientious state high court will be forced to devote substantial additional resources to its habeas docket. To avoid having the federal courts erroneously treat a silent denial as a merits adjudication, a majority of the justices of the California Supreme Court will have to agree on a basis for decision in each case or specifically explain that a majority could not reach agreement on any single issue (unless there is a reasoned lower court decision to which the federal courts can look, as permitted by *Ylst*). To facilitate this discussion and voting, the court's criminal central staff will need to recommend a disposition on each separate claim, and the justices will have to vote issue-by-issue. Even though the majority of California's silent denials likely are *Ylst* look-through orders, the additional work required to reach agreement or state a reason for the truly silent denials would be significant, especially given the state supreme court's disposition of over 3,400 non-capital habeas cases each year (*see ante* at 8) and the conclusion of its Chief Justice that issuing more detailed orders in capital habeas cases, which represent but a small fraction of its non-capital habeas caseload, would be unworkable. *See ante* at 14.

The California Supreme Court's docket rivals that of this Court, and perhaps it would not be inappropriate to consider the impact upon this Court if others read meaning into the denial of petitions for writs of certiorari.[13] Of course, it is well-settled that the denial of such a petition "imports no expression of opinion upon the merits of the case . . . ." *United States v. Carver*, 260 U.S. 482, 490 (1923); *see also Barber v. Tennessee*, 513 U.S. 1184 (1995) (Statement of Stevens, J., respecting the denial of certiorari). That is a matter of necessity. Certiorari jurisdiction "was designed to permit this Court to keep within manageable proportions . . . the business that is allowed to come before us." *Brown v. Allen*, 344 U.S. 443, 491 (1952) (Opn. of Frankfurter, J.). A denial of certiorari "is occasioned by a variety of reasons which precludes the implication" of a merits ruling. *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting). As with habeas denials in the California Supreme Court, "[d]ivergent and contradictory reasons often operate as to the same petition and lead to a common vote of denial. The want of explanations for denials of certiorari is in part due to the fact that a collective reason frequently could not be given." *Id.*

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[13] In fiscal year 2000-01, when Richter's silent denial was issued, the California Supreme Court received 8,891 new filings and decided 9,047 cases with 103 opinions (*2009 Court Statistics Report* at 4 (tbl. 1), 9 (tbl. 6)), while this Court had 7,852 new filings and decided 7,713 cases with 87 opinions. Journal of the Supreme Court of the United States, October Term 2000, at II, available at http://www.supremecourt.gov/orders/journal/jnl00.pdf. In fiscal year 2007-08, the California Supreme Court received 10,521 new filings and decided 10,440 cases with 116 opinions (*2009 Case Statistics Report* at 4 (tbl. 1), 9 (tbl. 6)), while this Court had 8,241 new filings and decided 8,374 cases with 74 opinions. Journal of the Supreme Court of the United States, October Term 2007, at II, available at http://www.supremecourt.gov/orders/journal/jnl07.pdf.

In *Ylst*, the State's *amicus* compared this Court's certiorari practices with the California Supreme Court's summary order procedures. It noted that habeas corpus petitions in the California Supreme Court frequently raise a multitude of claims. "[A]s there could be different reasons for dismissing each claim," *amicus* explained, "a summary dismissal of a habeas petition is likely to involve many different issues. Uniting the views of the justices on these disparate issues would at least equal the task of getting this Court to agree on its reasons for denying certiorari." Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (No. 90-68), 1990 U.S. S.Ct. Briefs LEXIS 627, *37. CACJ and the Academy agree.

Imposing a presumption that a silent denial is an adjudication on the merits would place an undue burden on the California Supreme Court. This Court said in *Coleman*, 501 U.S. at 739:

> It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment. We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions

> . . . [W]e will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim . . . in order that federal courts might not be bothered with reviewing state law and the record in the case.

These principles apply here as well.

◆

CONCLUSION

For the foregoing reasons, the Court should hold that a silent denial of a petition for writ of habeas corpus in the California Supreme Court is not an adjudication "on the merits" within the meaning of 28 U.S.C. §2254(d).

Respectfully submitted,

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IN THE

Supreme Court of the United States

KELLY HARRINGTON, Warden,

Petitioner,

vs.

JOSHUA RICHTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U. S. C. § 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

2. Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?

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IN THE

Supreme Court of the United States

KELLY HARRINGTON, Warden,

Petitioner,

vs.

JOSHUA RICHTER,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the application of the central habeas corpus reform of the landmark Antiterrorism and Effective Death Penalty Act of 1996. A negative answer to the question added by the Court would remove the application of that reform to a great many habeas corpus cases despite the clear language of the statute. Such a step would increase the delays, the expense, and the erroneous overturning of correct judgments that Congress sought to reduce when it enacted AEDPA. This result would be contrary to the interests CJLF was formed to protect.

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[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

SUMMARY OF FACTS AND CASE

The facts of the case and trial are stated in detail in the Brief for Petitioner at pages 2-15. This summary focuses on the procedural history of the case to frame the issues discussed in this brief.

On December 19, 1994, Joshua Johnson and Patrick Klein were shot in Johnson's home in Sacramento, California. Klein died, but Johnson survived. Respondent Joshua Richter and Christian Branscombe were convicted of the murder of Klein, the attempted murder of Johnson, and other crimes. Brief for Petitioner 2-3. The prosecution's evidence at trial included expert testimony regarding whether Klein was shot at the place where his body was found, rather than somewhere else in the house, which was relevant to the credibility of Richter's claim that he was outside the house and not a participant in the crimes. See *id.*, at 3-4.

On appeal, Richter made several allegations of ineffective assistance unrelated to the expert testimony question, which the Court of Appeal rejected in a written opinion. See App. to Pet. for Cert. 4a-19a. The California Supreme Court denied discretionary review on June 24, 1998, and the time to seek certiorari review in this Court expired on September 22, 1998. J. A. 9.

Nine days short of a year later, Richter filed a state habeas corpus petition in the California Supreme Court. See J. A. 8, 87. All three levels of California courts have original jurisdiction in habeas cases. See Cal. Const., Art. VI, § 10. Part VII of the petition is the ineffective assistance claim at issue in the present case, alleging, "Trial counsel rendered ineffective assistance of counsel in failing to present readily available expert testimony which directly supported his theory of the case." J. A. 15. The State[2] opposed this claim on the merits and as untimely. See Informal Response to Petition for Writ of Habeas Corpus, Cal. Supreme Court No. S082167, pp. 31-40, 64-76.[3]

A habeas petitioner who files in the Superior Court is entitled to at least "a brief statement of the reasons for denial. An order only declaring the petition to be 'denied' is insufficient." Cal. Rules of Court 4.551(g); see also former Rule 260(e) (in effect when the petition was filed). There is no corresponding rule for habeas petitions filed in appellate courts. See Rules 8.380-8.388. The California Supreme Court entered a summary denial, stating only, "Petition for writ of habeas corpus is DENIED." App. to Pet. for Cert. 22a.

On federal habeas, the District Court acknowledged the standard under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but then proceeded to reject Richter's claim directly under the standard of *Strickland* v. *Washington*, 466 U. S. 668

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[2] In the present case, the habeas petitioner is the certiorari respondent and vice versa. For clarity, we will refer to the parties as "Richter" and "the State."

[3] This pleading is available at http://www.cjlf.org/files/RichterStateHabResponse.pdf We understand that Richter intends to formally submit it to the Court but has not done so as of the printing deadline of this brief.

(1984), without further reference to AEDPA or the state court decision. The District Court found that trial counsel's handling of the serology and blood spatter issues did not fall below the "objective standard of reasonableness" for *Strickland*. App. to Pet. for Cert. 39a-40a. Having rejected Richter's claim on the performance prong of *Strickland*, the District Court noted that it need not decide the prejudice prong. App. to Pet. for Cert. 44a.

On appeal, the panel similarly acknowledged the AEDPA requirement but then proceeded on an "independent" review that differed little, if at all, from what a federal court would have done before AEDPA. See App. to Pet. for Cert. 64a. The Court of Appeals panel rejected some of the claims on the prejudice prong of *Strickland*, see *id.*, at 72a, and rejected the bloodstain pattern claim on the performance prong. See *id.*, at 73a-74a.

The Court of Appeals granted rehearing en banc. Contrary to the decisions of all three of the previous courts, the en banc court found that Richter had a meritorious claim of ineffective assistance. The en banc court further held, "The state court's conclusion to the contrary constituted an objectively unreasonable application of *Strickland*." App. to Pet. for Cert. 136a. Given that the District Court and the Court of Appeals panel had effectively reviewed the same claims *de novo*, the en banc court was implicitly holding that both of these courts had been unreasonable as well.

In a footnote, the en banc court said, "Because we would grant the writ whether we reviewed the state court's decision de novo or for objective unreasonableness, we apply the stricter unreasonableness standard. Thus, we need not determine whether or when an unreasoned state court decision warrants AEDPA deference." App. to Pet. for Cert. 99a.

The dissent noted that AEDPA does apply, resulting in "doubly deferential" review of counsel's performance. App. to Pet. for Cert. 156a, quoting *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1420 (2009). "I would conclude that there was no *Strickland* error and, *a fortiori*, no grounds for us to grant the writ under AEDPA." App. to Pet. for Cert. 197a.

The State petitioned this Court for a writ of certiorari, posing the question as whether the Ninth Circuit had misapplied the AEDPA standard. On February 22, 2010, this Court granted the petition, adding the question, "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?"

SUMMARY OF ARGUMENT

A summary disposition of a federal claim by a state court raises two different issues that must be kept distinct. In some cases, it may be unclear whether the disposition was on the merits or on procedural grounds, an issue related to the problem in *Coleman* v. *Thompson*, 501 U. S. 722 (1991). That issue is not presented in this case. The California Supreme Court's disposition, when considered in the context of the pleadings before it and its past statements on how it treats habeas petitions, was unambiguously on the merits.

The second issue is how a federal court should treat, under AEDPA, a court disposition that is clearly on the merits but lacks an explanation of the state court's reasoning. To resolve this issue, it is important to understand the nature of the rule of 28 U. S. C. § 2254(d). Although commonly called a rule of "deference," this statute actually establishes a modified rule of issue preclusion or collateral estoppel. A claim rejected by the state court on the merits cannot be granted by the federal court unless an exception applies. As the Second Circuit explained in *Sellan* v. *Kuhlman*, 261 F. 3d 303, 311 (2001), "Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process."

When the state court has rejected a petition without a fact-finding process, under a standard that permits in such a decision only by assuming any genuinely disputed facts in the petitioner's favor, the only exception that could apply is § 2254(d)(1). A federal court can find the requirements of that exception met in a case of a summary denial if the clearly established law, applied to the undisputed or assumed facts, leads to only one reasonable conclusion, *i.e.*, that the petitioner is entitled to relief.

For a claim where the petitioner must clear more than one hurdle, such as the ineffective assistance rule of *Strickland* v. *Washington*, 466 U. S. 668 (1984), the exception applies if a decision against the claim would be unreasonable on both prongs of the test. Although the state court may have actually rejected the claim on only one of the prongs, in practice this approach is unlikely to produce anomalous results. If there are two grounds on which a state court might have decided the case, one of which is reasonable and the other unreasonable, it is fair to presume that the court decided on the reasonable ground.

In the present case, a court could reasonably find for the State on both prongs of the *Strickland* test. Indeed, the District Court and initial Court of Appeals panel did so find in decisions that were effectively *de novo* review. No exception to AEPDA's modified rule of issue preclusion applies, and Richter's claim should be denied under § 2254(d).

ARGUMENT

I. A summary decision that is clearly on the merits is different from an ambiguous decision that is not necessarily on the merits.

The question added by the Court in the order granting certiorari is, "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?" Summary disposition can raise two different questions with regard to the application of 28 U. S. C. § 2254(d). First, there may be a question whether the state court decided the claim on the merits or on some other basis, a question related to the one presented in *Coleman* v. *Thompson*, 501 U. S. 722 (1991). Second, if the state court did decide the merits, the lack of an explanation raises issues regarding how to apply § 2254(d).

This case presents only the second question. There are some statements in the case law that might appear at first glance to relate to this question, but which, on closer examination, can be seen to deal only with the first question. It is important not to confuse the two.

Between *Brown* v. *Allen*, 344 U. S. 443 (1953), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), if the state court denied a claim solely on the merits, the federal habeas court decided *de novo* the questions of federal law and mixed questions of law and fact. See, *e.g.*, *Wright* v. *West*, 505 U. S. 277, 287-289 (1992) (plurality opinion); *Thompson* v. *Keohane*, 516 U. S. 99, 110, and n. 9 (1995). However, if the state court rejected a claim on the ground that it was procedurally defaulted, the federal court could proceed to the merits only if the "cause and prejudice" test was satisfied. See *Coleman*, 501 U. S., at 750. The "plain statement" rule raised a presumption that the state court decision was on the merits if the state court decision "fairly appeared to rest primarily on resolution of [federal] claims . . . and did not clearly and expressly rely on an independent state ground . . . ." *Id.*, at 735.

Coleman involved a terse order from the Virginia Supreme Court that listed the pleadings and then said, "Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." *Id.*, at 727-728. This Court held that the order was sufficiently clear to invoke the procedural default rule. The state court's order was an "explicit grant of a dismissal motion based solely on procedural grounds." *Id.*, at 744.

After AEDPA, a summary denial may raise a "reverse *Coleman*" problem. The state may be the party arguing that the state court's disposition was on the merits. In *Green* v. *Johnson*, 116 F. 3d 1115, 1121 (1997), the Fifth Circuit set out a framework for dealing with these kinds of dispositions.

> "We must inquire, on a case-by-case basis, whether a resolution was on the merits, considering the following factors: (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state courts' opinions suggest reliance upon procedural grounds rather than a determination of the merits."

In *Green*, consideration of the context led to the conclusion that the disposition was on the merits. See *ibid.* In *Mercadel* v. *Cain*, 179 F. 3d 271, 274-275 (CA5 1999), the context led to the conclusion that the disposition was on procedural grounds. Other circuits have similarly found summary dispositions to be on the merits for the purpose of § 2254(d) when there is no reason to believe that the decision was on procedural grounds. See, *e.g.*, *Aycox* v. *Lytle*, 196 F. 3d 1174, 1177 (CA10 1999) (an order holding "as a matter of law, Petitioner is not entitled to relief" was a decision on the merits); *Cardwell* v. *Greene*, 152 F. 3d 331, 335, 339 (CA4 1998) (order "finding no merit in other complaints raised by petitioner, the Court is of the opinion that the writ of habeas corpus should not issue as prayed for" was on the merits).

Other cases deal with a state court decision that is entered with a written opinion, but the opinion does not expressly address the federal question later raised in federal habeas. Sometimes the state court does not address the issue because the defendant fails to brief it or fails to make clear that he is making a federal claim separate from his state-law claims. That was the situation in *Romine* v. *Head*, 253 F. 3d 1349, 1365, n. 15 (CA11 2001), a holding the court later characterized by saying, "We would not defer to that which did not exist." *Wright* v. *Moore*, 278 F. 3d 1245, 1254 (CA11 2002). The correct disposition of such a case would normally be to deny the claim as procedurally defaulted, see *Baldwin* v. *Reese*, 541 U. S. 27, 33-34 (2004), but in *Romine* the state had defaulted the default argument. See *Romine*, *supra*, at 1365, n. 15.

A case of genuine and unresolvable ambiguity was presented in *Fortini* v. *Murphy*, 257 F. 3d 39 (CA1 2001). Objecting to the exclusion of certain defense evidence, Fortini argued only state grounds at trial, but on appeal he added a federal constitutional claim under *Chambers* v. *Mississippi*, 410 U. S. 284 (1973). See *Fortini*, *supra*, at 43. The state appellate court rejected the state law claim and made no mention of the federal claim. The state appellate court could have rejected the *Chambers* claim as procedurally defaulted, but it made no statement to that effect. See *id.*, at 45. A state court ruling on the merits "would [have been] easy to uphold . . . under AEDPA's ordinary standard for evaluating state legal determinations," *id.*, at 47, but the First Circuit could not have confidence that any such ruling had been made. "[W]e can hardly defer to the state court on an issue that the state court did not address." *Ibid.* The court found it had to review the claim *de novo*, and it found no constitutional violation. See *ibid.*

Brown v. *Maloney*, 267 F. 3d 36, 40 (CA1 2001), purports to apply *Fortini* but has some unnecessarily broad language: "In the absence of reasoning on a holding from the state court on the issue, we cannot say the claim was 'adjudicated on the merits' within the meaning of 28 U. S. C. § 2254(d)." On its facts, though, *Brown* is like *Romine*, not *Fortini*. The state court did not address the question because Brown raised it for the first time on petition for rehearing, and the state defaulted the default issue. See *id.*, at 39. Despite its needlessly expansive language, *Brown* reached a correct result, and its broad dictum has already been narrowed by the First Circuit. See *Zuluaga* v. *Spencer*, 585 F. 3d 27, 32 (2009).

Cases such as *Fortini*, with genuine ambiguity regarding whether the state court decision rests on procedural grounds or the merits, present a difficult problem that need not and should not be resolved in the present case. That question is simply not presented. There is no ambiguity here.

This case involves a claim of ineffective assistance of counsel. Such claims are categorically exempt from the California rule against raising on habeas a claim that could have been raised on appeal. See *People* v. *Mendoza Tello*, 15 Cal. 4th 264, 267, 933 P. 2d 1134, 1135 (1997); cf. *Massaro* v. *United States*, 538 U. S. 500, 504 (2003) (same rule for same reason for federal defendants under § 2255). The State raised a timeliness objection and also opposed the claim on the merits. See *supra*, at 3. The California Supreme Court has told us unambiguously that when it sustains a timeliness objection by the State it says so. See *In re Robbins*, 18 Cal. 4th 770, 815, n. 34, last ¶, 959 P. 2d 311, 340, n. 34 (1998). In this case, as in *Green* v. *Johnson*, *supra*, the context of the summary denial makes it unambiguously on the merits.

The only basis on which it could be contended that § 2254(d) does not apply would be an argument extrapolating from the broad, unsubstantiated dicta of *Brown* v. *Maloney*, *supra*, to a conclusion that summary denials are not adjudications on the merits for the purpose of 28 U. S. C. § 2254(d). That proposition has been rejected by every Federal Court of Appeals to squarely consider it. To fully understand why this unanimous rejection is correct, it is necessary to consider the true nature of the rule commonly called the "deference standard."

II. Subsection 2254(d) is a modified rule of issue preclusion.

The question added by the Court in this case turns on the meaning of the phrase "adjudicated on the merits" in 28 U. S. C. § 2254(d). That meaning is illuminated by understanding the nature of the rule enacted by that subdivision. The rule is commonly referred to as a rule of "deference" in the case law, see, *Renico* v. *Lett*, 559 U. S. __, n. 1 (No. 09-338, May 3, 2010) (slip op., at 6) (collecting cases), just as it was during the floor debate. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 945, and n. 400 (1998). However, this convenient shorthand expression is not a substitute for a close examination of the nature of the rule in a case where its exact nature matters.

A. *The Language of the Statute.*

The place to begin is the language of the statute. "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court *shall not be granted* with respect to any claim that was *adjudicated on the merits* in State court proceedings *unless* . . . ." 28 U. S. C. § 2254(d) (emphasis added).

This states the general rule. What follows the "unless" are exceptions to the general rule. This rule is a prohibition against granting relief to a party who has already litigated and lost the same claim. It falls into the same family of rules as the doctrines of res judicata, law of the case, successive petitions, and *Stone* v. *Powell*, 428 U. S. 465 (1976). Rules of this class forbid relitigation of a dispute, with certain exceptions, because of the unfairness to the party who prevailed in the first suit of being forced to fight the same battle over again. "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. 15,058, cols. 1-2 (1995) (statement of Sen. Biden); Scheidegger, 98 Colum. L. Rev., at 946.

More specifically, § 2254(d) is a rule of issue preclusion, traditionally known as collateral estoppel. See *Baker* v. *General Motors Corp.*, 522 U. S. 222, 233, n. 5 (1998). Under that doctrine, "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim . . . ." *Ibid.* Section 2254(d) does not bar the entire habeas petition, and it does not bar issues that might have been but were not litigated in the state proceeding, although such issues will generally be barred by the exhaustion and procedural default rules. The rule of § 2254(d) applies to and only to claims adjudicated on the merits in state court, and it bars them unless and only unless one of the enumerated exceptions applies. It is thus a modified rule of issue preclusion. Cf. *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996) (referring to § 2244(d) as "a modified res judicata rule").

B. Habeas Corpus and Prior Adjudications.

Far from being a radical innovation, § 2254(d) brings federal habeas for state prisoners back toward the mainstream of Anglo-American jurisprudence. The procedure is still unique, but it is less anomalous than it was before.

The traditional general rule is res judicata. State court judgments have res judicata effect in federal court, even if the federal court disagrees with the result. That has been the rule, if not from day one, at least from year two, the Full Faith and Credit Act of 1790. See Scheidegger, *supra*, 98 Colum. L. Rev., at 912; see also *Angel* v. *Bullington*, 330 U. S. 183, 187 (1947) (correctness of state decision is immaterial); *Allen* v. *McCurry*, 449 U. S. 90; 103-104 (1980) (no right to relitigate federal claim in federal court).

At common law and in early nineteenth century America, a prior denial of habeas relief was treated very differently from a judgment of conviction of a crime. A prior denial of habeas relief was not res judicata, although a court did have discretion to deny a habeas petition on the basis of a previous denial. See R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 574 (2d ed. 1876).

A judgment convicting the prisoner of a felony was quite different.

> "[T]he celebrated habeas corpus act of the 31 Car. II . . . . enforces the common law. This statute excepts from those who are entitled to its benefit . . . persons convicted or in execution. The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be reexamined upon a writ of *habeas corpus*?" *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 202 (1830).

The answer, as of 1830, was no. "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous." *Id.*, at 203; Scheidegger, *supra*, 98 Colum. L. Rev., at 928-932.

In the late nineteenth and early twentieth centuries, the scope of issues reviewable on habeas corpus was expanded with an increasingly strained definition of "jurisdiction" until the 1940s, when this Court finally dropped the pretense and expanded collateral attacks on convictions to all constitutional questions. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932-933; *Waley* v. *Johnston*, 316 U. S. 101, 104-105 (1942). That expansion did not render state court decisions irrelevant to the federal habeas process, however. The state court judgment had relevance similar to that of a prior denial of federal habeas relief.

In *Salinger* v. *Loisel*, 265 U. S. 224 (1924), a federal prisoner case, the Court noted that the availability of appeal from denials of habeas relief warranted giving those denials more weight than in earlier times. See *id.*, at 231. A District Court receiving a successive habeas petition had discretion to deny the petition solely on the ground of a prior determination. See *id.*, at 231-232. In *Ex parte Hawk*, 321 U. S. 114 (1944) (*per curiam*), the Court made very clear that the same rule applied to state court dispositions. "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." *Id.*, at 118 (citing *Salinger*).

Similarly, *Darr* v. *Burford*, 339 U. S. 200, 215 (1950), overruled on other grounds, *Fay* v. *Noia*, 372 U. S. 391, 435-436 (1963), held that following state review and denial of certiorari, the habeas court "*may* decline to examine further into the merits *because they have already been decided against the petitioner*. [Footnote citing *Salinger*.]" (Emphasis added). Words can hardly be more clear. *Darr* was a rule of prior adjudication, albeit a flexible, discretionary one.

The *Salinger* rule of successive petitions evolved from one of amorphous discretion to the very lax rule of *Sanders* v. *United States*, 373 U. S. 1, 17-18 (1963), to the more structured rule of *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991), and finally into the strict codified rules of 28 U. S. C. §§ 2244(b) and 2255(h). The effect of the prior state adjudication of the claim has followed a similar, though not parallel, evolution. *Brown* v. *Allen*, 344 U. S. 443 (1953), effectively reduced the state decision to a mere precedent from another jurisdiction, albeit a particularly pertinent one. See *Wright* v. *West*, 505 U. S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). In § 2254(d), Congress has done with *Darr* just what *McCleskey* and § 2244(b) did with *Salinger*; it has restored the spirit of the pre-1953 discretionary rule but replaced it with a structured and more tightly limited rule.

Throughout American history, the availability of federal habeas for state prisoners has varied as a function of confidence in state courts relative to federal courts. It was forbidden in the beginning, when federal courts were a feared innovation. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932. It was expanded during Reconstruction, retracted in the late nineteenth century, see, *e.g.*, *In re Wood*, 140 U. S. 278, 285-286 (1891), expanded again in the 1950s and 1960s during the civil rights struggle, see *Brown* v. *Allen*, *supra*; *Fay* v. *Noia*, 372 U. S., at 438, and retracted again in the last quarter of the twentieth century in *Stone* v. *Powell*, 428 U. S. 465 (1976), *Teague* v. *Lane*, 489 U. S. 288 (1989), *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) (overruling *Fay*), and other cases.

The enactment of a qualified prior adjudication bar is the next logical step in this evolution. It takes us back to the principle that relitigation is the exception and finality of judgments is the rule. See *Ex parte Hawk*, 321 U. S., at 118 (*per curiam*) ("not ordinarily re-examine"). It does so based on the recognition that state courts today are far different from what they were in 1953 or 1963, that they warrant more confidence, and that their judgments deserve more respect.

The nature of this rule is plain and found on the surface. Cf. *Ex parte Siebold*, 100 U. S. 371, 393 (1880). It forbids granting a claim previously rejected on the merits by a coordinate court, unless an exception applies.

III. A summary disposition on the merits of the federal claim, as opposed to procedural default, is an "adjudication on the merits" for the purpose of § 2254(d).

A. Adjudication, Not Explanation.

With the nature of § 2254(d) as a modified rule of issue preclusion firmly in mind, we can easily see the correctness of the opinion of the Second Circuit in *Sellan* v. *Kuhlman*, 261 F. 3d 303, 311-312 (2001):

> " 'Adjudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground . . . .
>
> "Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process. Nowhere does the statute make reference to the state court's process of reasoning . . . .
>
> "In sum, the plain meaning of § 2254(d)(1) dictates our holding: For the purposes of AEDPA deference, a state court 'adjudicates' a state prisoner's federal claim on the merits when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U. S. C. § 2254(d)(1) to the state court's decision on the federal claim—even if the state court does not explicitly refer to either the federal claim or to relevant federal case law."

This is fully consistent with the nature of § 2254(d) as a modified rule of issue preclusion. The prerequisite for issue preclusion is simply the actual litigation and resolution of the issue in a final judgment. See *supra*, at 12.

Sellan has been widely quoted and followed not only in the Second Circuit, see, *e.g.*, *Benn* v. *Greiner*, 402 F. 3d 100, 104, n. 3 (CA2 2005), but also in other circuits. See *Teti* v. *Bender*, 507 F. 3d 50, 56-57 (CA1 2007); *Rompilla* v. *Horn*, 355 F. 3d 233, 247 (CA3 2004), rev'd on other grounds, 545 U. S. 374 (2005); *Santellan* v. *Cockrell*, 271 F. 3d 190, 193-194 (CA5 2001); *Lambert* v. *Blodgett*, 393 F. 3d 943, 969 (CA9 2004). In *Wright* v. *Moore*, 278 F. 3d 1245, 1254 (2002), the Eleventh Circuit surveyed the decisions and found,

> "Six circuits have squarely addressed that question, all of them concluding that the summary nature of a state court's decision does not lessen the deference that it is due. See *Sellan* v. *Kuhlman*, 261 F. 3d 303, 310-12 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F. 3d 149, 158-62 (4th Cir. 2000) (en banc), *cert. denied*, 122 S. Ct. 74 (2001); *Harris* v. *Stovall*, 212 F. 3d 940, 943 n.1 (6th Cir. 2000); *Aycox* v. *Lytle*, 196 F. 3d 1174, 1177-78 (10th Cir. 1999); *James* v. *Bowersox*, 187 F. 3d 866, 869 (8th Cir. 1999), *cert. denied*, 528 U. S. 1143, 120 S. Ct. 994, 145 L. Ed. 2d 942 (2000); *Delgado* v. *Lewis*, 181 F. 3d 1087, 1091 n.3 (9th Cir. 1999), *cert. granted and judgment vacated on other grounds*, 528 U. S. 1133, 120 S. Ct. 1002, 145 L. Ed. 2d 926 (2000). We agree with those circuits." (Footnote omitted).

More recent cases are also in accord. See, *e.g.*, *Saiz* v. *Ortiz*, 392 F. 3d 1166, 1176 (CA10 2004).

> "AEDPA's trigger for deferential review is *adjudication, not explanation*. [Citing *Wright*]. When a state court has truly avoided (or merely overlooked) the petitioner's federal claim, a federal court may step into the breach and review de novo. But judicial opacity is a far cry from judicial avoidance. It is the result to which we owe deference, not the opinion

expounding it." *Clements* v. *Clarke*, 592 F. 3d 45, 55 (CA1 2010) (emphasis added).

B. Applying the Exceptions.

The lack of an explanation for the state court decision certainly makes the federal court's task more difficult in terms of applying paragraphs (1) and (2) of § 2254(d). Here again, it is useful to keep the nature of the rule in mind. Section 2254(d) is not a standard of review on appeal. Federal district courts have no jurisdiction to hear appeals from the decisions of state supreme courts. The principle that "habeas corpus will not be allowed to do service for an appeal," *Sunal* v. *Large*, 332 U. S. 174, 178 (1947), applies to state prisoner cases as well as federal. See *Reed* v. *Farley*, 512 U. S. 339, 354 (1994). Opponents of broad habeas review have long protested against practices which seemed to treat habeas petitions as if they were appeals. See *Brown* v. *Allen*, 344 U. S. 443, 539-540 (1953) (Jackson, J., concurring in the judgment). It took 43 years, but Congress finally vindicated Justice Jackson's position by enacting § 2254(d).

At the top of subsection (d) we have the general rule: no relitigation of claims resolved on the merits by the state court. See Scheidegger, 98 Colum. L. Rev., at 946; 141 Cong. Rec. 15,058, cols. 1-2 (1995) (statement of Sen. Biden). Determination that the state court decision was on the merits establishes that subsection (d) applies, and the claim is precluded unless an exception applies. Thus, the federal habeas court's task is not to apply a standard of review to the state court decision, but only to ascertain whether the requirements of either exception to the general rule of preclusion have been met.

"A state-court decision is 'contrary to' our clearly established precedents if it 'applies a rule that

> contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.' *Williams* v. *Taylor*, 529 U. S. 362, 405-406 (2000). Avoiding these pitfalls does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early* v. *Packer*, 537 U. S. 3, 8 (2002) *(per curiam)* (emphasis in original).

In the absence of any expressed reasoning, it is necessary to focus on the result. When a petition for a writ of habeas corpus is denied without explanation, it will typically be denied without an evidentiary hearing. In California, a denial on the merits without an evidentiary hearing is proper only if the court concludes that the petitioner would not be entitled to relief even assuming any genuinely disputed facts in his favor. A petition alleging facts that, if true, would entitle petitioner to relief requires further proceedings. See *People* v. *Romero*, 8 Cal. 4th 728, 739-740, 883 P. 2d 388, 392-393 (1994); *In re Serrano*, 10 Cal. 4th 447, 455-456, 895 P. 2d 936, 942 (1995). That is a typical rule. See, *e.g.*, *Schriro* v. *Landrigan*, 550 U. S. 465, 474 (2007). Generally, then, these cases will not involve issues of unreasonable factual findings under the second exception but will instead focus on the first.

Suppose that the clearly established federal law, as set forth in this Court's precedents and as applied to the admitted or assumed facts of the case, leads only to one reasonable conclusion—the petitioner is entitled to relief. In that event, a denial of relief must be based on either a choice of the wrong standard or an unreasonable application of it. That is the approach the Second Circuit took in *Ryan* v. *Miller*, 303 F. 3d 231 (2002).

The state appellate court had addressed the defendant's other claims and then said, " 'The defendant's remaining contentions are either unpreserved for appellate review or without merit.' " *Id.*, at 245-246. The federal court first had to ascertain that the Confrontation Clause claim was not among those unpreserved. *Id.*, at 246, and n. 6. "Thus, the unreasonable application standard of AEDPA applies." *Ibid.* The court then reviewed the clearly established federal law, *id.*, at 247-248, applied it to the facts of the case, and held "that the state court was objectively unreasonable in not finding a Confrontation Clause violation by applying *Bruton* [v. *United States*, 391 U. S. 123 (1968)] to the facts of this case." *Id.*, at 251.

Ryan demonstrates that a grant of relief on federal habeas following an unexplained state decision is not impossible, but it is not typical. Claims dismissed in this manner will usually be so patently without merit that AEDPA is not even needed. Most of the remainder will be within the zone of reasonable disagreement, see, *e.g.*, *Sellan*, 261 F. 3d, at 310, exactly the situation where Congress decided the state court decision should stand.

Finally, there is the problem of how to deal with rules of law that require the defendant to establish more than one element before he can obtain relief. The most common of these is the rule at issue in this case, the ineffective assistance of counsel standard of *Strickland* v. *Washington*, 466 U. S. 668 (1984). A court applying this standard need not decide both the performance and prejudice prongs of the test but may properly deny relief upon finding that the defendant cannot meet one of them, leaving the other undecided. See *id.*, at 697.

In these circumstances, a federal court can say that the state court unreasonably applied *Strickland* only if a ruling against the defendant would be unreasonable on both prongs. The defendant may object that this amounts to "deferring" to a ruling that the state court never made, but § 2254(d) is not really a rule of deference. Once the prerequisites of the general rule of issue preclusion are met, the question is whether the elements of an exception are met.

The objection might also be raised that this approach gives greater "deference" to an unexplained decision than it gives to a full opinion on the issue. If the state court produces a reasoned opinion resolving only one prong of *Strickland*, and the habeas court finds the resolution of that prong to be unreasonable, then the habeas court proceeds to decide the other prong *de novo*. See *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003).

There are two answers to this objection. The first is that occasional anomalies in the application of AEDPA are insufficient reason to evade the language of the statute. See *Dodd* v. *United States*, 545 U. S. 353, 359-360 (2005). In this case, the statute clearly provides that a state court adjudication on the merits precludes relief unless the requirements of an exception are met, and that finding cannot be made on a summary denial if a holding against the defendant on either prong would be reasonable.

The second answer is that the anomaly is more theoretical than real. A court denying a claim under one of *Strickland*'s prongs will decide the one it considers clearest. If the federal habeas court decides that a court could reasonably have decided against the defendant on one prong but not the other, the reasonable ground of the decision is highly likely to be the actual ground of decision. Judges are presumed to know and follow the law, see *Lambrix* v. *Singletary*, 520 U. S. 518, 532, n. 4 (1997), and it is not too much to presume that judges have taken the reasonable path rather than the unreasonable one.

In the present case, the California Supreme Court rejected Richter's claims on the merits. Section 2254(d) requires denial of the claim on the ground of prior adjudication unless that prior adjudication would be an unreasonable application of *Strickland* on both prongs of that test. In the present case, both the District Court and the initial Court of Appeals panel engaged in what amounts to *de novo* review and found that Richter's claim had no merit. See *supra*, at 3-4. The rejection of his claim by three consecutive courts should be sufficient to establish that the issue is at least close, and that is all that is needed to establish that the exception of § 2254(d)(1) does not apply.

Whenever the underlying merits question is close, the § 2254(d) question is necessarily easy. See *Fortini*, 257 F. 3d, at 47-48 (case "would be easy" under AEDPA standard but "is a close case" *de novo*); *Sellan*, 261 F. 3d, at 310 ("might well be inclined to grant" under *de novo* review, but denial is "plain" under AEDPA). If federal courts would approach AEDPA cases in this manner, much needless delay and expense could be avoided, and the intent of Congress in passing AEDPA would be more fully implemented. As soon as the underlying merits of the case can be seen to be close, the AEDPA question is resolved, because "close questions, by definition, never have clearly correct answers." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 819 (1988). If an answer in petitioner's favor is not clearly correct, the state court's contrary answer cannot be unreasonable. That is all a federal habeas court needs to decide to bring the case to an end.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

May, 2010

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 09-587

IN THE

Supreme Court of the United States

KELLY HARRINGTON,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors and legal scholars with expertise in appellate advocacy and other areas of the law pertaining to post-conviction remedies and procedures. See the Appendix for more information about *amici*.

Together, *amici curiae* write to address our concern that the Brief of several State Attorneys General, writing as *amici curiae* in support of Petitioner, asserts empirical claims regarding the number and frequency of unexplained "summary dispositions" by state courts, which, in our view, do not set forth an accurate picture of appellate practice in the courts of the United States. As this Court considers the important questions presented in this case, the Court should have before it a balanced and accurate view of appellate practice. We therefore write to demonstrate how Amici States overstate the extent to which state courts rely exclusively upon unexplained decisions at all levels of state adjudication in order to deny habeas petitions for post-conviction relief.

SUMMARY OF THE ARGUMENT

In an attempt to support Petitioner's argument that the applicability of § 2254(d)'s limitation on relief does not require "a written or an 'explained' ruling from the state court," Pet. Br. at 17, Amici States list a smattering of state-court statistics and rules, which purportedly demonstrate that state courts across the country have a regular practice of issuing unexplained decisions when denying "on the merits" habeas petitions for post-conviction relief. See Brief of Texas et al. as Amici Curiae in Support of Petitioner (hereinafter "AG Br.") at 4-7. Although several states have rules and procedures for "summary dispositions," the statistics and rules relied upon by Amici States do not establish that claims for post-conviction relief frequently leave a state-court system with a denial on the merits yet without any state court ever providing reasons. Indeed, many states expressly require such explanations by law or applicable court rules. Although such explanations may be brief, a short summary by at least one state tribunal stands in stark contrast to the completely unexplained state-court decision that is at issue in this case.

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

In addition:

- Amici States' data are misleading in that the statistics often include not only decisions on habeas petitions but also figures regarding direct appeals (sometimes both criminal and civil appeals) and other types of petitions or filings.
- Amici States' data often lump into a single category dispositions based on procedural grounds and dispositions based on the merits.
- Amici States' data often do not distinguish between a summary *denial* and a summary *dismissal*. Dismissal of a claim is different from a denial in many ways; for example, dismissals often allow the petitioner to amend the claim before the adjudication becomes final.

Moreover, dismissals are often based on procedural grounds, not on the merits.

- Amici States' data and citations do not acknowledge that state laws or court rules most often require at least one court (even if a lower court) to provide a form of written reasoning explaining the grounds on which a claim is denied, particularly where such denial is based on the merits of a facially valid claim.

By ignoring these distinctions and other aspects of the data they cite, Amici States present a highly distorted picture of state-court reliance on unexplained denials of post-conviction relief. As a result, the statistics and rules cited by Amici States do not undermine Respondent's position that § 2254(d) should not apply when, as is the case with Richter's ineffective assistance claim, no state court ever provided any explanation at all of the reasons for denying a claim, especially one like the instant claim that is facially valid. Because the term "summary disposition" has different meanings in different states—and, indeed, often has multiple meanings even *within* a particular state—this Court should decline to establish a "per se" rule that would automatically deem any "summary disposition" issued by a state court to be an "adjudication on the merits" for purposes of applying § 2254(d).

ARGUMENT

I. MATERIALS CITED BY AMICI STATES DO NOT ESTABLISH THAT STATE COURTS RELY FREQUENTLY OR SUBSTANTIALLY ON UNEXPLAINED DENIALS WHEN DECIDING FEDERAL CLAIMS RAISED IN PETITIONS FOR HABEAS CORPUS.

This case presents a situation where *no* state court has at any point offered a reasoned decision on the claim at issue. As the court of appeals explained: "Here, the California Supreme Court denied Richter's habeas petition in one sentence, without providing any reasoning for its decision. No other state court commented on Richter's claim that counsel provided ineffective assistance . . . ." *Richter* v. *Hickman*, 578 F.3d 944, 951 n.5 (9th Cir. 2009) (en banc); see also *id.* at 977 (Bybee, J., dissenting) (stating that this case is one "where no state court has explained its reasoning"). As such, reviewing courts have no decision to "look through" to determine whether the state court's decision was objectively reasonable. See *Ylst* v. *Nunnemaker*, 501 U.S. 797, 804-05 (1991) ("The essence of unexplained orders is that they say nothing. We think that a presumption which gives them *no* effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play. . . . To decide the present case, therefore, we being by asking which is the last *explained* state-court judgment on the . . . claim.") (emphases in original).

The state court denied Respondent's petition in a one-line order which read, in its entirety, "Petition for writ of habeas corpus is DENIED." Resp. Br. in Opp. at 10. According to Petitioner, such "summary or unexplained dispositions" are common in California courts. Pet. Br. at 29-30 & n.3; see also *id.* at 29 (stating that it "is a common practice of both state and federal courts to issue unexplained decisions" and citing statistics only from California state courts and only with respect to the number of "written opinions" issued). As explained in the Amicus Brief of California Attorneys for Criminal Justice and the California Academy of Appellate Lawyers, the California habeas system is unique in how it handles petitions for a writ of habeas corpus. See generally Brief for California Attorneys for Criminal Justice and the California Academy of Appellate Lawyers as Amici Curiae in Support of Respondent. Nevertheless, picking up on Petitioner's argument in the context of California state courts' reliance on "summary or unexplained dispositions," Amici States assert that "California is not unusual in this regard." AG Br. at 4.

Amici States then present a string of state-court statistics and rules that purportedly illustrate the prevalence of "summary dispositions" in state courts across the country. AG Br. at 4-7. These examples point to statistics and rules from 13 states: Alabama, Alaska, Connecticut, Florida, Hawai'i, Illinois, North Dakota, Wisconsin, Texas, New York, Arizona, Delaware, and Utah. Amici States do not offer an explanation for having chosen this particular sampling of states. Presumably, it is because Amici States believe these examples are illustrative—perhaps more so than other potential examples—of the proposition they seek to establish. A review of the materials cited, however, shows that Amici States have not acknowledged the substance of these materials and, consequently, have overstated the extent to which states use "summary dispositions" that resemble the unique California system that generated the facts at issue in this case—a situation where no state court ever provided any reasoning or explanation of the grounds for denying Richter's ineffective assistance claim.

A. Alabama

Amici States assert that the Alabama "state supreme court issued 1506 decisions without opinion and 252 decisions with opinion, in disposing of 698 direct appeals" in fiscal year 2008. AG Br. at 5 (citing Alabama Unified Judicial System: *FY 2008 Annual Report & Statistics* at 8, *available at* http://www.alacourt.gov/Annual%20Reports/2008AOCAnnualReport.pdf). However, the first two figures (1506 and 252) reflect the Alabama Supreme Court's *total* case load of appeals—which includes direct appeals as of right, petitions for discretionary review in both civil and criminal cases, state bar petitions, mandamus petitions, and other miscellaneous filings. The report does not specify which of the court's summary dispositions, if any, purported to resolve the merits of a criminal or post-conviction relief appeal.

Furthermore, these data are substantially irrelevant because it is the Alabama Court of Criminal Appeals (CCA), not the Alabama Supreme Court, which handles the overwhelming majority of the state's criminal and post-conviction relief work. See Alabama Unified Judicial System: *FY 2008 Annual Report & Statistics* at 9 ("The Alabama Court of Criminal Appeals is a five-judge court having exclusive appellate jurisdiction of all criminal cases, including all post-conviction writs arising therefrom."). According to the report, the CCA "issued 1,338 decisions in submitted appeals during FY 2008," of which 137 cases resulted in "[w]ritten opinions," and an additional 1,081 cases involved "[m]emorandum decisions." *Id.* Pursuant to Rule 54 of the Alabama Rules of Appellate Procedure, governing "Opinions and 'No Opinion' Cases of the [CCA]," the CCA is obligated even in so-called "No Opinion" cases to "write a memorandum addressing the appellant's contentions and giving a reason for rejecting them." Ala. R. App. P. 54(b). Thus, contrary to Amici States' assertion, the relevant data indicate that few, if any, post-conviction cases leave the Alabama state courts without a reasoned order.

Amici States also point to the Alabama Rules of Criminal Procedure as an example of how "[s]ome States explicitly provide by rule for summary dispositions in their courts." AG Br. at 7 (citing, among other state court rules, Ala. R. Crim. P. 32.7(d)).[2]

Yet this provision, on its face, governs *dismissals*, typically with leave to amend, not *denials*. Additionally, many of the stated grounds for a "summary disposition" are essentially procedural and result from a determination that the pleading is deficient, not an adjudication on the merits of a facially valid claim. Further, under Ala. R. Crim. P. 32.9(a) and (d), unless a petition is dismissed, in which case Rule 32.7(d) states that "[l]eave to amend shall be freely granted," petitioners for post-conviction relief are entitled to an evidentiary hearing to determine disputed issues of material fact, and "[t]he court shall make specific findings of fact relating to each material issue of fact presented." The CCA has also held that:

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[2] The text of the cited rule provides:

> (d) Summary Disposition. If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.

Ala. R. Crim. P. 32.7(d).

> The fact that the circuit judge is not required to conduct an evidentiary hearing on a petitioner's claims of ineffective assistance of trial counsel if that judge personally observed the conduct of those counsel does not . . . relieve the judge of the responsibility of entering a sufficiently specific order addressing each of the petitioner's claims of ineffective assistance of trial counsel.

Holloway v. *State*, 848 So. 2d 1017, 1019 (Ala. Crim. App. 2002) (citing to other decisions where the CCA "noted . . . that meritorious allegations 'warrant either an evidentiary hearing or an adequate explanation for their denial'").

B. Alaska

Amici States cite the Office of the Administrative Director, Alaska Court System: Annual Statistical Report 8, 14 (2009), as showing that the state Supreme Court issued 120 dispositions by published opinion and 40 summary dispositions on merits, while the state court of appeals issued 48 dispositions by published opinion and 157 summarily on merits. See AG Br. at 5 (citing Alaska Court System, *Annual Statistical Report* 2009, *available at* http://www.courts.alaska.gov/reports/annualrep-fy09.pdf). The report itself does not define what is meant by "summary dispositions" or "summarily on merits." To the extent that the Alaska Supreme Court summarily denied review of a case, or summarily affirmed the appellate court, a federal court would look through to the lower court's decision for application of § 2254(d).

Regarding intermediate appellate court opinions, page 11 of the same report shows that, in 2009, the Alaska Court of Appeals published 50 full opinions and 142 memorandum opinions. In Alaska, unpublished memorandum opinions issued by the Alaska Court of Appeals include both factual and legal analysis of the arguments raised in the appeal. See Alaska Court System, *Recent Court of Appeals Memorandum Opinions*, *available at* http://www.courts.alaska.gov/moj.htm (linking to example memorandum opinions). In any event, it is not at all clear from Amici States' statistics that the state courts are issuing "summary dispositions" that in any way resemble the completely unexplained decision at issue in this case.

C. Connecticut

Amici States cite the Hon. Chase T. Rogers, Biennial Connecticut Judicial Branch Report and Statistics 2006-2008, at 37, as showing that state appellate courts disposed of 298 criminal appeals by opinion and 101 criminal appeals "by other means." AG Br. at 5-6 (citing Biennial Connecticut Judicial Branch, *Report and Statistics 2006-2008*, *available at* http://www.jud.ct.gov/Publications/BiennialReport2006-08.pdf). First, these statistics do not distinguish direct appeals from post-conviction appeals; rather, they include the full criminal caseload of the state court of appeals. Second, and importantly, there is no indication of what "by other means" signifies. The report refers to "Appeals Disposed by Opinion" and "All Other Dispositions." *Id.* The catch-all category of "all other dispositions" presumably includes cases dismissed by the appellate court, as well as decisions based on procedural grounds, neither of which would constitute an "adjudication on the merits," whether issued as a "summary disposition" or not.

Further, there is no information about how appeals in habeas proceedings are generally resolved and whether trial courts routinely issue factual findings and conclusions of law in adjudicating habeas petitions. See, *e.g.*, *Washington* v. *Comm'r of Correction*, 950 A.2d 1220 (Conn. 2009) (trial court issued written decision explaining basis for denial of habeas petition). If it is standard practice in the state for lower courts to issue reasoned decisions, then even an unexplained affirmance or denial upon review by the appellate court would not replicate the facts at issue in this case, where no court has offered any reasoning on the merits for a reviewing court to look through to.

D. Florida

Amici States cite the District Court of Appeal Workload and Jurisdiction Assessment Committee, Report and Recommendations app. A (Nov. 2006), as showing that Florida appellate courts disposed of 38.0% of criminal cases and 65.8% of post-conviction cases by short, per curiam affirmance. AG Br. at 6 (citing District Court of Appeal Workload and Jurisdiction Assessment Committee, *Report and Recommendations* (Nov. 2006), *available at* http://www.floridasupremecourt.org/pub_info/documents/DCAWorkload/2006_DCAReport.pdf). Under Florida law, however, these "short" orders still must include reasoning.

In capital post-conviction cases, Florida law requires the trial court to provide "detailed findings of fact and conclusions of law with respect to each claim" raised in the post-conviction motion, and to "attach[] or referenc[e] such portions of the record as are necessary to allow for meaningful appellate review." Fla. R. Crim. P. 3.851(f)(5)(D). In non-capital post-conviction proceedings, if the trial court's denial of the motion is not predicated on the legal insufficiency of the motion on its face, the court is required to attach to its order "a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief. . . ." Fla. R. Crim. P. 3.850(d); see also *Nixon* v. *State*, 932 So. 2d 1009, 1018 (Fla. 2006) (per curiam) ("In order to support summary denial, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims."); *Gentry* v. *State*, 464 So. 2d 659, 660 (Fla. Dist. Ct. App. 1985) (discussing requirements of state trial courts when issuing orders in connection with proceedings for post-conviction relief). Further, if an evidentiary hearing is conducted, the trial court is required to "make findings of fact and conclusions of law with respect" to any issues addressed at the hearing. Fla. R. Crim. P. 3.850(d).

Given the requirement of "reasoned" denials by Florida trial courts, it appears that federal courts will always have at least some reasoning to analyze when applying § 2254(d) to a habeas petition that originated in Florida, irrespective of a short, per curiam affirmance by a Florida appellate court.

E. Hawai'i

Amici States cite the Hon. Ronald T.Y. Moon, The Judiciary, State of Hawai'i: 2009 Annual Report Statistical Supplement tbl. 1, as showing that the state supreme court and court of appeals decided 19 criminal cases by published opinion, 19 criminal cases by memorandum opinion, and 160 criminal cases by summary disposition order. AG Br. at 6 (citing http://www.courts.state.hi.us/docs/news_and_reports_docs/annual_reports/Jud_Statistical_Sup_2009.pdf). Review of sample "summary disposition orders" from Hawai'i establishes that these orders are not one-line statements of denial. Rather, they contain detailed discussions of the facts and relevant law and provide a reasoned explanation for the ultimate decision.[3] Indeed, although Hawai'i Rules of Criminal Procedure allow for dispositions that deny petitions for post-conviction relief upon the court's determination that "the allegations and arguments have no merit," the rules nevertheless require that the court "shall state its findings of fact and conclusions of law in entering its judgment on the petition." Hawai'i R. Penal P. 40(g)(2)–(3).

F. Illinois

Amici States cite the Annual Report of the Illinois Courts as "reporting that of 3755 criminal cases disposed by state appellate court, 850 were disposed of without written opinion or order." AG Br. at 6 (citing Annual Report of the Illinois Courts, *Statistical Summary* at 130 (2008), *available at* http://www.state.il.us/court/SupremeCourt/AnnualReport/2008/StatsSumm/2008_Statistical_Summary.pdf). Here again, however, Amici States have not provided information about the types of appeals included in this statistic and whether they are in fact relevant to the issue presented in this case. Two pages later, the same report indicates that few, if any, of the dispositions "without opinion or order" qualify as adjudications "on the merits."

Of the 850 dispositions at issue, 423 were dismissals on "Motion of Appellant," and 17 were on "Motion of Appellee"; 142 resulted from "Failure to Comply With Rules/Orders"; 32 were categorized as

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[3] *See* Hawai'i Appellate Court Opinions and Orders 2010, *available at* http://www.courts.state.hi.us/opinions_and_orders/opinions/2010/index.html for examples; "summary disposition orders" can be identified by "s.d.o." following the case title.

"Lack of Jurisdiction No Appealable Order"; three involved denials of "Leave to Appeal"; 65 involved denials of a "Motion for Leave to File Late Notice of Appeal"; 41 were "Remanded With Direction For Further Proceeding"; 31 involved cases that were "Dismissed in the Trial Court"; 10 involved entry of a "Bail Order"; four ended with a "Confession of Error"; one was "Transferred to Proper Court"; and the remaining 81 were designated merely as "Other" or "Other Dispositions."

Moreover, Amici States do not discuss the extent to which a lower court may or may not have been required to provide a reasoned explanation of its decision. For example, Illinois law requires that, in capital cases, a trial court's disposition of a petition for post-conviction relief must provide a written explanation of the court's factual findings and legal conclusions even if it dismisses the petition as "frivolous or patently without merit." 725 Ill. Comp. Stat. 5/122-2.1(2).

G. North Dakota

Amici States cite figures indicating that the North Dakota Supreme Court used "summary disposition" to resolve 34 of 130 criminal cases in 2009. AG Br. at 6 (citing Hon. Gerald W. VandeWalle, *2009 Annual Report, North Dakota Court System* at 9, *available at* http://www.ndcourts.gov/_court/News/ndcourtsar2009.pdf). This figure is misleading, however, because a typical "summary disposition" in North Dakota conveys substantially more information about the bases for the court's decision than the one-line, unexplained denial entered by the California Supreme Court in Richter's case. Under Rule 35.1 of the North Dakota Rules of Appellate Procedure, which Amici States themselves cite as an example of a state-court rule that explicitly provides for summary dispositions, AG Br. at 7, the state Supreme Court is authorized to issue an "affirmance by summary opinion" under seven enumerated circumstances, one or more of which must be identified in the court's order. This requirement alone provides more reasoning than the entirely unexplained order at issue in this case. See, *e.g.*, *Clifford* v. *Redmann*, 719 N.W.2d 384 (N.D. 2006) (per curiam) (affirming trial court's summary dismissal under N.D. R. App. P. 35.1(a)(1) where the "district court determined [petitioner] was not entitled to the relief . . . because no new matters were raised in his current action that were not already addressed in his previous attempts for relief").

Indeed, a search for "summary disposition" in Westlaw's ND-CS (North Dakota cases) database for the year 2009 returned 57 orders, 32 of which addressed criminal direct appeals and challenges to denials of post-conviction relief. (Others addressed civil matters.) A review of those orders—many of which contain multiple sentences or even multiple paragraphs—indicates that the North Dakota courts adhere closely to the mandate of Rule 35.1 in both criminal and civil cases. For example, in 13 of the 32 criminal orders retrieved through this search, the court cited Rule 35.1(a)(2), indicating the presence of lower court findings "that are not clearly erroneous." The presence of such findings would itself provide a written explanation that a federal habeas court could "look through." Additionally, in seven of the orders retrieved through the above search, the court made clear that its affirmance rested on procedural grounds, not on the merits, again demonstrating the Amici States' fallacy in interpreting the term "summary disposition" to refer *per se* to an "adjudication on the merits."

Under North Dakota's Uniform Postconviction Procedure Act, courts "may grant a motion by either party for summary disposition" if the "application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." N.D. Cent. Code Ann. § 29-32.1-09(1). Notably, however, the Act further requires that a court issuing an order in post-conviction proceedings "shall make explicit findings on material questions of fact and state expressly its conclusions of law relating to each issue presented"; and, "[i]f the court rules that the applicant is not entitled to relief, its order must indicate whether the decision is based upon the pleadings, is by summary disposition [*i.e.*, judgment as a matter of law], or is the result of an evidentiary hearing." *Id.* § 29-32.1-11.

H. Wisconsin

Amici States cite Wisconsin Court System, Court of Appeals Annual Report 3 (2009), as showing that 28% of total case terminations in state courts of appeals were by summary disposition. See AG Br. at 6 (citing Court of Appeals Annual Report (2009), *available at* http://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=47578). Under Wisconsin law, a summary disposition may be the result of the appellate court's own motion or issued by request of the parties. Wis. Stat. Ann. § 809.21(1). According to the Wisconsin Court of Appeals Internal Operating Procedures, VI, Decisional Process, *available at* http://www.legis.state.wi.us/rsb/scr/5999.pdf, cases identified for summary disposition are decided by the panel following review of the briefs and the record. The case is then assigned to staff attorneys "for preparation of an order implementing the court's decision." Importantly, "[t]he order will identify the case, the deciding judges, the ultimate result or disposition, and *the reasons for the result.*" *Id.* (emphasis added). The draft order is then submitted to the panel for final decision.

At that point, the case is "disposed of summarily by order" only if *all* of the following occur:

- the panel "unanimously agrees on the decision";
- the panel "unanimously agrees the issues involve no more than the application of well-settled rules of law or the issues are decided on the basis of unquestioned and controlling precedent or the issues relate to sufficiency of evidence or trial court discretion and the record clearly shows sufficient evidence or no abuse of discretion"; *and*
- "the issues may be resolved by merely *stating the reasons for the decision* without a detailed analysis."

Id. (emphasis added).

Thus, unlike here, the summary disposition process in Wisconsin does not allow for entirely unexplained decisions. See also Wis. Stat. Ann. § 974.06(3)(c)–(d) ("Unless the motion and the files and records of the [post-conviction] action conclusively show that the person is entitled to no relief, the court shall . . . grant a prompt hearing . . . [and] [d]etermine the issues and make findings of fact and conclusions of law.").

I. Texas

Amici States cite the Texas Court of Criminal Appeals Activity report for fiscal year 2009 as showing that "Habeas corpus relief [was] denied without written order" in 946 cases. AG Br. at 4 (citing Court of Criminal Appeals Activity: FY 2009, at 2, *available at* http://www.courts.state.tx.us/pubs/AR2009/cca/cca-activity-report-2009.pdf). While the number itself is accurately stated, what it actually signifies within the context of Texas' scheme for state habeas review is not clear.

In Texas, the power to grant state habeas relief is vested exclusively with the Texas Court of Criminal Appeals (CCA). The CCA exercises this power with assistance from trial-level courts, which accept and review initial filings, conduct fact development proceedings where necessary, enter findings of fact and conclusions of law, and offer dispositional recommendations to the CCA. See generally Tex. Code of Crim. P. Art. 11.07; 11.071. In capital cases, the trial-level state habeas court must enter written findings of fact and conclusions of law in *all* capital cases, whether or not the claims raised required an evidentiary hearing or other method of resolving disputed factual issues. See *id.* Art. 11.071 §§ 8(c), 9(e). In non-capital cases, the trial-level state habeas court is authorized to dispose of a case without entering written findings of fact and conclusions of law, but it may do so only after determining that there are no "controverted, previously unresolved facts material to the legality of the applicant's confinement." *Id.* Art. 11.07 § 3(c). Where any such factual issues are present, the court must undertake procedures to resolve them and enter appropriate findings. *Id.* Art. 11.07 § 3(d).

Viewed against this legal backdrop, one cannot be confident that the report of 946 non-capital habeas denials by the CCA "without written order" actually reflects the number of state habeas petitions denied on the merits without any findings of fact or conclusions of law by any state court. For while the CCA declined to issue reasoned opinions in those cases, it is quite likely that some proportion nevertheless involved findings and conclusions issued by the trial-level court, see *id.* Art. 11.07 § 3(d) and Art. 11.071 §§ 8(c), 9(e), to which a federal habeas court could "look through" when applying § 2254(d).[4] Moreover, even if all 946 dispositions were devoid of reasoning by any state court, that number still represents less than 1/5 of the CCA's total habeas dispositions for the year. And, as acknowledged by Amici States in a footnote, at least some summary dispositions in Texas rest on procedural grounds, rather than on the merits. AG Br. at 14 n.1.

There is, therefore, no sound reason to believe that a decision by this Court recognizing that § 2254(d) cannot be applied absent *some* indication of the state court's approach or rationale would have a meaningful impact on state or federal habeas litigation in Texas.

J. New York

Amici States cite a pre-AEDPA law review article from 1995, which reported that, "in a study of state courts in Alabama, California, New York, and Texas, 'about seventy-five percent of [habeas] petitions were dismissed or denied summarily without a reason.'"

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[4] *See Ylst*, 501 U.S. at 804-05; *see also Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2258-59 (2010) (stating that "[t]he relevant state-court decision" for purposes of federal habeas review is that of the Michigan Appeals Court, where both the state trial court and state appeals court provided a reasoned decision and the state supreme court thereafter denied petitioner's application for leave to appeal in an unexplained, one-sentence order (*see People* v. *Thompkins*, 471 Mich. 866, 683 N.W.2d 676 (2004)).

AG Br. at 5 (citing Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev. 237, 262 (1995)) (alteration in original). Apart from conflating the distinct concepts of a "dismissal" and a "denial," it seems to stretch reason to claim that a study cited in a 15-year-old, pre-AEDPA law review article accurately portrays the current state of appellate practice in connection with state courts' handling of habeas petitions, particularly given the points above regarding the more current statistics cited by Amici States pertaining to Alabama and Texas.

Further, New York Criminal Procedure Law provides: "Regardless of whether a hearing was conducted, the court, upon determining the motion [for post-conviction relief], must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." N.Y. Crim. P. L. § 440.30.

K. Arizona, Delaware, and Utah

Amici States point to Arizona, Delaware, and Utah as states that "explicitly provide by rule for summary dispositions in their courts." AG Br. at 7 (citing court rules from these states and, as noted above, rules from Alabama and North Dakota). Each of the rules cited by Amici States refers to summary "dismissals" rather than "denials" and includes other nuances not addressed by the Amici States.

Arizona law provides, in pertinent part:

> On reviewing the petition, response, reply, files and records, and disregarding defects of form, the court shall identify all claims that are procedurally precluded under this rule. If the court, after identifying all precluded claims, determines that no remaining claim presents a

> material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, *the court shall order the petition dismissed.* If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law.

Ariz. R. Crim. P. 32.6(c) (emphasis added). This rule first requires Arizona courts to identify "procedurally precluded" claims. Then, the petition is to be dismissed, not denied, if it presents no issues of material fact or law which would entitle a defendant to relief *and* if no purpose would be served by further proceedings. A comment to Rule 32.6(c) states that this section "instructs the court to make a final adjudication of all the petitioner's claims—those lurking in the background as well as those specified." *Id.*, cmt. to Rule 32.6(c) and (d). The comment continues:

> If the court finds from the pleadings and record that all of the petitioner's claims are frivolous and that it would not be beneficial to continue the proceedings, it may dismiss the petition. . . . However, if the court finds any colorable claim, it is required by *Townsend* v. *Sain*, [372 U.S. 293 (1963)], to make a full factual determination before deciding it on its merits.

Id.

It appears, then, that Arizona rules, although permitting "summary dispositions" in post-conviction proceedings, require that such orders "make a full factual determination" in connection with any claim that is not "procedurally precluded" or frivolous on its face.

Delaware law permits the Superior Court to issue a "summary dismissal . . . '[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief." Del. Super. Ct. R. Crim. P. 61(d)(4). A *dismissal* is distinct from a *denial*, and a number of scenarios could result in a "dismissal" based on the court's determination that "the movant is not entitled to relief"—including, for example, lack of jurisdiction or petitioner's failure to comply with a statutory requirement or applicable court rule (see Del. Super. Ct. R. Crim. P. 39(h) ("Dismissal")), neither of which constitutes an adjudication of a claim on its merits.

Additionally, under Rule 61(h)(3), the court may "make such disposition of the motion as justice dictates" in cases where "it appears that an evidentiary hearing is not desirable." Prior to that determination, however, the attorney general is required (for any case that is not "summarily dismissed" under Rule 61(d)(4)) to file a response that "explain[s] the factual and legal basis for the state's position on each ground for relief alleged in the motion in sufficient detail to enable the court to determine whether an evidentiary hearing is desirable or summary disposition of the motion is appropriate." Del. Super. Ct. R. Crim. P. 61(f)(1)–(2). Thus, the components of Delaware's "summary disposition" procedure include requirements to ensure that the record contains information referencing the criteria upon which the court decided to reject petitioner's claim(s).[5]

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[5] *See, e.g.*, *Videtto* v. *State*, 892 A.2d 1085 (Del. 2006) ("Having carefully considered the parties' respective positions, we find it manifest that the judgment of the Superior Court should be affirmed on the basis of the Superior Court's well-reasoned

Finally, Amici States point to Utah Rules of Civil Procedure 65C(h)(1), which pertains to "summary dismissal of claims" in post-conviction proceedings. This provision requires the court to "review the petition" and to issue an order *dismissing* any claim that "has been adjudicated in a prior proceeding" or that "appears frivolous on its face." As noted above, dismissals are often based on procedural grounds, not an "adjudication on the merits." Moreover, in issuing such orders of dismissal, the court must "stat[e] either that the claim has been adjudicated or that the claim is frivolous on its face," although such "order of dismissal need not recite findings of fact or conclusions of law." Utah R. Civ. P. 65C(h)(1). A claim is "frivolous on its face" when, "based solely on the allegations contained in the pleadings and attachments," one of three limited circumstances applies: (a) the facts alleged do not support a claim for relief as a matter of law; (b) the claim has no arguable basis in fact; or (c) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition. Utah R. Civ. P. 65C(h)(2).

Thus, while true that Utah court rules allow "summary dispositions," these rules, like those of North Dakota and Delaware, are quite specific and themselves provide an explanation for the basis of the ruling. See also Part I.G, *supra* (discussing North Dakota). Utah law also expressly prohibits these "summary dismissals" in capital cases. See Utah R. Civ. P. 65C(h)(4).

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decision . . ., which adopted the findings and recommendation of the Superior Court Commissioner . . . .").

II. NEITHER PETITIONER NOR AMICI STATES HAVE SHOWN THAT IT WOULD DISTURB THE REGULAR AND TYPICAL POST-CONVICTION PRACTICES OF MOST STATE COURTS IF THIS COURT HELD THAT A COMPLETELY UNEXPLAINED DENIAL IS NOT AN "ADJUDICATION ON THE MERITS" UNDER § 2254(d).

Petitioner claims that it would "largely eviscerat[e] the effect of § 2254(d) in many cases" if this Court were to hold that a state court's unexplained denial of post-conviction relief is not an "adjudication on the merits" for purposes of applying "the deferential-review-for-reasonableness standard of § 2254(d)." Pet. Br. at 17. To support this proposition, Petitioner baldly asserts that "[i]t is a common practice of both state and federal courts to issue unexplained decisions." *Id.* at 27.[6] As demonstrated above, although a number of states permit some type of "summary disposition" in the context of petitions for post-conviction relief, applicable state procedures governing "summary dispositions" very often, perhaps even typically, require that at least one state court provide some type of reasoning or explanation of the grounds for denying a claim on the merits. See Part I, *supra*. Furthermore, several states expressly *prohibit* "unexplained" denials of post-conviction relief, such that Respondent's construction of § 2254(d) would have no impact on these states' procedures.[7] Other states expressly prohibit "unexplained" denials by way of state court precedent. See, *e.g.*, *Datt* v. *Hill*, 227 P.3d 714, 722 (Or. 2010) (en banc) ("[T]o be clear, and to enable federal courts to determine habeas corpus jurisdiction, a judgment denying claims for post-conviction relief must, at a minimum: (1) identify the claims for relief that the court considered and make separate rulings on each claim; (2) declare, with regard to each claim, whether the denial is based on a petitioner's failure to utilize or follow available state procedures or a failure to establish the merits of the claim; and (3) make the legal bases for denial of relief apparent.").[8]

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[6] We strongly disagree with Petitioner's assertion that federal appellate courts' decisions on "unexplained district court orders" on routine court matters such as "motions to conduct discovery[,] motions for the appointment of counsel[, or] motions to amend the pleadings" are not "fundamentally different" from final state-court adjudications on the merits in connection with post-conviction proceedings. Pet. Br. at 18.

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[7] *See, e.g.*, Ark. R. Crim. P. 37.3(a) (requiring the trial court to "make written findings" in post-conviction cases even in the case of a "summary disposition"); *id.* at 37.5(i) (for capital cases, requiring the court to make "specific written findings of fact" and "specific written conclusions of law" with respect to each legal and factual issue, whether or not a hearing is held); Ind. Post Conviction R. 1 § 6 ("The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held."); Md. Rules, R. 4-407 (requiring a judge to "prepare and file or dictate into the record a statement setting forth separately each ground upon which the petition is based, the federal and state rights involved, the court's ruling with respect to each ground, and the reason for the action taken thereon"); Mich. Crim. R. 6.503(B)(2) ("If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial."); Mo. R. Crim. P. 29.15(j) and 24.035(j) (requiring the court to "issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held"); Nev. Rev. Stat. Ann. 34.830(1) ("Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court."); Ohio Rev. Code Ann. § 2953.21(G) (requiring trial courts to make findings of fact and conclusions of law when determining whether a habeas petition presents grounds for relief); 22 Okla. Stat. Ann. § 1083(c) (requiring that an "order disposing of an application without a hearing shall state the court's findings and conclusions regarding the issues presented"); *id.* § 1084 (when a hearing is held, requiring the court to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); Tenn. Code Ann. § 40-30-111(b) ("Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each ground.").

By citing to irrelevant or incomplete statistics and only a select sampling of rules, Amici States present a picture of appellate practice that is not consistent with what state courts actually do or what they are expressly required to do. Amici States have created a straw man argument by claiming that "unexplained" denials such as the one presented in this case are common under existing state-court practice. In fact, however, neither Petitioner nor Amici States have shown that states regularly rely on completely unexplained denials. In sum, they have failed to show that it would "largely eviscerat[e] the effect of § 2254(d) in many cases" if this Court were to hold that § 2254(d)'s limitation on relief does not apply in cases where no state court has at any point provided any level of reasoning or rationale in connection with a denial, supposedly on the merits, of a federal claim.

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[8] *See also Nixon*, 932 So. 2d at 1018 ("In order to support summary denial, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims."); *Gentry*, 464 So. 2d at 661 ("[T]he trial court erred in summarily denying the motion without holding an evidentiary hearing or attaching to its order 'that portion of the record which conclusively shows the prisoner to be entitled to no relief.'"); *Holloway*, 848 So. 2d at 1019 ("Our review of the allegations Holloway raises in his brief on appeal is hampered because the circuit court failed to make written findings of fact concerning each material issue of fact presented. Indeed, it would be premature for this Court to review the issues without the circuit court's first making such findings of fact."); *State* v. *Gilley*, 517 S.W.2d 7, 9 (Tenn. 1974) ("[W]e concur with the Court of Criminal Appeals that the duty imposed upon the trial Court [by Tenn. Code Ann. § 40-30-111 (formerly § 40-3818)] to 'state the findings of fact and conclusions of law with regard to each such ground' is mandatory."); *State* v. *Craven*, 656 S.W.2d 872, 873 (Tenn. Crim. App. 1982) ("Upon the final disposition of the petition, the trial court shall include in its order or in a written memorandum its findings of fact and conclusions of law with regard to each ground presented, as required by TCA 40-3818 [(now Tenn. Code. Ann. § 40-30-111)]" (citing *Gilley*, *supra*)).

CONCLUSION

Amici join Respondent in urging the Court to affirm the decision of the Court of Appeals in this case.

Respectfully submitted,

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July 16, 2010

APPENDIX

LIST OF LAW PROFESSORS AND LEGAL SCHOLARS JOINING AS *AMICI CURIAE*

Ursula Bentele. Ms. Bentele, Professor of Law at Brooklyn Law School, is co-author of Appellate Advocacy, Principles and Practice (LexisNexis, 4th Ed. 2004). She has taught appellate advocacy, criminal law, and capital punishment law. For ten years she supervised the Criminal Appeals Clinic at the law school, and she is now the Director of its Capital Defender and Federal Habeas Clinic.

Mary E. Berkheiser. Professor Berkheiser is the Director of Clinical Studies and of the Juvenile Justice Clinic at the William S. Boyd School of Law, University of Nevada, Las Vegas. In addition, she teaches Criminal Law and Criminal Procedure and has taught Advanced Issues in Criminal Law and Procedure, Criminal Appellate Clinic, and Federal Courts.

Ray Bernstein. Ray Bernstein is a member of the Legal Analysis, Research, and Writing Faculty at Santa Clara University School of Law. He teaches Appellate Advocacy, as well as Legal Analysis, Research, and Writing. His relevant experience includes work as Senior Staff Attorney, Criminal Research Division, for the United States Court of Appeals for the Ninth Circuit, as well as a clerkship with the Hon. Fern M. Smith (retired) in the Northern District of California. Ray has also practiced civil and criminal law in California, and has received numerous awards for his pro bono service.

Timothy D. Blevins. Professor Blevins has taught legal writing and legal methods for thirteen years. He has attended a number of professional meetings where he has presented papers on the design and use of rubrics, structuring multiple semester writing programs, and the use of technology in teaching and assessing legal education. He also coordinates the Legal Education Advancement Program for potential applicants to the Florida A&M University College of Law.

Linda H. Edwards. Professor Linda H. Edwards (William S. Boyd School of Law, University of Nevada, Las Vegas) has taught brief writing, oral advocacy, and appellate practice for twenty-three years. Prior to teaching, she practiced law for ten years, and she continues to teach and consult with appellate practitioners. She is the author of two leading texts on brief writing and oral advocacy and is presently preparing an advanced text. She is a frequent national speaker on topics of advocacy and appellate practice.

Sidney L. Harring. Sidney L. Harring, Professor of Law at CUNY Law School, received his J.D. and Ph.D. degrees from the University of Wisconsin. A founding member of the faculty of the City University of New York School of Law, he has taught at six law schools, including three as a Fulbright professor, and held three National Endowment for the Humanities Fellowships.

Christopher Hawthorne. Christopher Hawthorne is Clinical Professor of Law and Assistant Director of Academic Support at Loyola Law School Los Angeles. He teaches Legal Writing and Ethics, and was formerly a defense attorney specializing in criminal appeals.

Jeffrey L. Kirchmeier. Jeffrey L. Kirchmeier is a Professor of Law at CUNY School of Law, where he directs the school's Moot Court appellate advocacy program in addition to teaching courses such as criminal law, criminal procedure, and capital punishment and the courts. He received his B.A. and J.D. degrees from Case Western Reserve University. In addition to his professional writings that have appeared in journals, books, reports, and practice publications, he is also the co-author of a study aid for first-year law students.

Jacqueline Kutnik-Bauder. Jacqueline Kutnik-Bauder is an Assistant Professor of Legal Writing at St. Louis University School of Law, where she teaches Legal Research & Writing, Appellate Advocacy, and Pre-Trial Drafting. She was formerly an attorney for the Youth Advocacy Unit of the Missouri State Public Defender's Office, and she has extensive experience in civil rights, criminal, administrative, and appellate litigation. She received her B.A. from the University of California at Davis and her J.D./M.S.W. from Washington University Schools of Law and Social Work.

Daniel S. Medwed. Daniel S. Medwed is a Professor of Law at the University of Utah where he teaches criminal law and evidence, among other courses. His research focuses on issues related to wrongful convictions and post-conviction procedure. He is a graduate of Yale College and Harvard Law School.

Philip N. Meyer. Philip N. Meyer is Professor of Law at Vermont Law School. He is co-author of two books and has written extensively on several subjects, including legal writing, appellate advocacy, and trial practice. He has directed or coordinated Legal Writing and Lawyering Skills Programs at Vermont Law School, University of Connecticut School of Law, and New York University School of

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Tiffany R. Murphy. Professor Murphy is an Assistant Clinical Professor at the University of Missouri-Kansas City School of Law and serves as Legal Director of the Midwestern Innocence Project. Her work with the indigent began with the Federal Defenders Office of Eastern Washington and Idaho, and she also has worked in various state and federal capital habeas units in Florida, Pennsylvania, and Nevada. She has argued before the Florida Supreme Court and has worked on several cases resulting in exoneration or reduced sentences.

Sean D. O'Brien. Sean D. O'Brien is an Associate Professor at University of Missouri-Kansas City School of Law, where he teaches Criminal Law, Criminal Procedure, and Postconviction Remedies. He is a member of the ABA Task Force on Postconviction Remedies, and former Chair of the Missouri Bar Criminal Law Committee.

Anne R. Traum. Anne R. Traum is an Associate Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas. Professor Traum teaches criminal procedure and directs the school's Appellate Clinic. She is the author of *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 Md. L. Rev. 545 (2009).

Mark E. Wojcik. Mark E. Wojcik is a professor of law at The John Marshall Law School in Chicago, where he has taught lawyering skills and coached appellate moot court teams for more than fifteen years. He previously clerked for the Supreme Court of Nebraska.

AMICUS CURIAE BRIEF

No. 09-587

In the

Supreme Court of the United States

Kelly Harrington, Warden,

Petitioner,

v.

Joshua Richter,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice.

SUMMARY OF ARGUMENT

NACDL agrees with Richter that the question of 28 U.S.C. § 2254(d)'s applicability to a summary state court disposition need not be reached in this case because the claims presented in Richter's state habeas corpus petition were not "adjudicated on the merits" by the California Supreme Court. Even if the state court's order did include an adjudication of the merits of Richter's *Strickland v. Washington*, 466 U.S. 668 (1984), claim, however, application of § 2254(d) would still be impossible because the state court's order lacks the information necessary to inform the specific inquiries mandated by the plain language and structure of the statute.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

The question of § 2254(d)'s applicability to a summary state court disposition is one of statutory construction, and it must be answered from the plain language and structure of the statute. By its terms, § 2254(d) authorizes deferential treatment of a state court decision only after that decision has been subjected to the analyses prescribed in subparts (d)(1) and (2). Where the state court's decision fails to provide the information necessary to facilitate those analyses, however, the process Congress designed for determining the availability of deferential treatment cannot be carried out. Simply put, while § 2254(d) permits *informed* deference, it makes no provision for *blind* deference.

To establish entitlement to relief, a habeas petitioner must prove both that he "is in custody in violation of the Constitution," § 2254(a), and that the state court decision rejecting his claim on the merits was "contrary to, or involved an unreasonable application of, clearly established federal law," or "was based on an unreasonable determination of the facts ...," § 2254(d). The § 2254(a) inquiry involves traditional application of established constitutional rules to the evidentiary record. The § 2254(d) inquiry, by contrast, looks to the state court's handling of the petitioner's claim in light of binding federal law and the available record. Giving effect to the presumption that state courts are competent adjudicators of federal rights, § 2254(d) prohibits a federal court from remedying a constitutional violation merely because it disagrees with the outcome reached by the state court; instead, § 2254(d) permits a remedy only where the presumption of state court competence is determined, through the analyses prescribed by § 2254(d)(1) and (2), to be unwarranted as to the particular claim or issue before the federal court.

The analyses required by § 2254(d) cannot be performed in the absence of some articulation of the state court's reasoning. When a claim involves more than one potentially dispositive component – like Richter's *Strickland* claim does – a summary state court order prevents the federal court from discerning which components, if any, were actually adjudicated, and from performing the "was contrary to," "involved an unreasonable application of," and "was based on an unreasonable determination of the facts" inquiries mandated by § 2254(d)(1) and (2). These inquiries cannot be replaced by assumptions that the state court adjudicated a claim in its entirety, and that it did so through application of the correct law to appropriately determined facts. Indulging such assumptions would read § 2254(d)(1)'s "was contrary to" clause out of the statute, and would render the past participles "involved" (§ 2254(d)(1)) and "was based on" (§ 2254(d)(2)) meaningless.

Application of § 2254(d) to summary state court dispositions would also produce a perverse incentive structure, under which the measure of "deference" given to a state court would be inversely proportional to the amount of reasoning that court discloses in support of its decision. Reading § 2254(d) to apply only where the state court decision provides the information necessary to the analyses dictated by the statute, however, is consistent with states' interests in finality, comity and federalism. State courts that choose not to articulate their reasons for rejecting constitutional claims remain free to do so, and while § 2254(d) is an important part of the habeas scheme, an array of other barriers to review and relief remain in place regardless of whether a state court's decision is eligible for the additional protection made available through § 2254(d).

If § 2254(d) were construed to apply to summary state court dispositions, the impracticability of doing so would have to be accounted for. The accommodation most reconcilable with the statute would require that a state court's rationales be credited to the extent they can be discerned. But where they cannot, and where the federal court's independent assessment of the merits reveals a constitutional violation, the federal court should be permitted to draw the intuitive conclusion that the state court's silent rejection of a meritorious constitutional claim was tainted by one or more of the defects enumerated in § 2254(d)(1) and (2).

Finally, application of § 2254(d) in connection with the issue of Richter's trial counsel's deficient performance would also be inappropriate because counsel's deposition testimony was considered for the first time by the federal district court. If the state court decided the deficient performance question, it did so on a record that was materially incomplete. As a result, even if the state court decided Richter's claim "on the merits," those "merits" changed significantly with the addition of trial counsel's deposition, such that the state court decision is no longer relevant for § 2254(d) purposes.

ARGUMENT

In the order granting certiorari, this Court directed the parties to brief and argue the following question not presented by the Warden: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)?" NACDL agrees with Richter that this question need not be reached in this case because California law makes clear that the state court's order was not an "adjudication on the merits." Even if that order could be read to include a merits adjudication of Richter's *Strickland* claim, however, application of § 2254(d) would still be inappropriate because the state court's decision contains no information with which to undertake the specific inquiries mandated by the plain language and structure of the statute. Furthermore, in this particular case, any attempt to apply § 2254(d) would be inappropriate because the lower federal courts considered evidence material to the question of counsel's performance that was not before the state court. The resulting difference in the "merits" of the *Strickland* performance prong as they stood before the state and federal courts would also foreclose application of § 2254(d) as to that portion of Richter's claim.

I. The role and operation of § 2254(d) as dictated by the plain language of the statute.

The question posed in the Court's order granting certiorari is one of statutory construction, not statutory supplementation. Thus, while the Court has used the phrase "AEDPA deference," and the Warden and his *amici* embrace that phrase as if it were bedrock habeas law, it is essential to recognize that the answer to the Court's question lies in – and must be derived from – the language and structure of a multi-part statute in which the word "deference" does not appear. *See, e.g., Harbison v. Bell,* 129 S.Ct. 1481, 1493 (2009) (Thomas, J., concurring in the judgment) (quoting *id.* at 1491 (Roberts, C.J., concurring in the judgment)) ("This Court is not tasked with interpreting § 3599 in a way that it believes is consistent with the policy outcome intended by Congress. Nor should this Court's approach to statutory construction be influenced by the supposition that 'it is highly unlikely that Congress intended' a given result."); *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries*

Corp., 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

It is true that proper application of § 2254(d) often yields *results* that can, in appropriate cases, be characterized as "deferential" to state court decisions. *See, e.g.*, *Renico v. Lett*, 130 S.Ct. 1855, 1865 (2010). It is equally true, however, that there is a fundamental distinction between *informed* deference and *blind* deference. As will be discussed below, the former occurs as a permissible result of a federal court's analysis – prescribed by and performed under the plain language of § 2254(d)(1) and (2) – of a state court decision bearing discernable indicia of its rationale. The latter, by contrast, simply has no footing in the language of the statute, and cannot be reconciled with the process Congress designed.

A. The scheme of habeas corpus review established by §§ 2254(a) and (d).

A habeas petitioner seeking relief on a claim previously rejected by a state court for non-procedural reasons must ordinarily establish two things: *first*, that a constitutional *right* has been violated within the meaning of § 2254(a); and *second*, that a *remedy* may issue because one or more of the conditions enumerated in § 2254(d) has been met.[2] *See Gonzalez*

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[2] The issues posed by §§ 2254(a) and (d) need not be taken up in any particular order. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). As a practical matter, there are cases in which it is so

v. Crosby, 545 U.S. 524, 532 n.4 (2005) ("We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d).").

Pursuant to § 2254(a), a state prisoner is ineligible for habeas relief unless he "is in custody in violation of the Constitution or laws or treaties of the United States." Absent such a violation, there is no need to consider the availability of a remedy, because there has been no injury for which a remedy could be required. *See, e.g., Berghuis v. Thompkins*, 130 S.Ct. 2250, 2265 (2010) ("Courts can ... deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on

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obvious that a petitioner cannot satisfy § 2254(d) that there is no need to invest substantial time in a § 2254(a) analysis. *See, e.g., Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quickly disposing of petitioner's *Estelle v. Smith*, 451 U. S. 454 (1981), claim under § 2254(d)(1) because "[t]he differences between this case and *Estelle* are substantial, and our opinion in *Estelle* suggested that our holding was limited to the 'distinct circumstances' presented there"); *Andrade*, 538 U.S. at 71-73 (rejecting non-capital proportionality challenge under § 2254(d)(1) because governing federal standard afforded state court such wide latitude that only an exceptionally poor decision could conceivably be sufficient to authorize relief). Where the outcome is not so obvious, however, it is ordinarily necessary for a habeas court to conduct some form of the merits analysis associated with § 2254(a) before it can perform the separate but related analysis called for by § 2254(d). *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 387-390 (2005); *Ramdass v. Angelone*, 530 U.S. 156, 167-176 (2000).

de novo review, see § 2254(a).").[3]

Where a prisoner has shown a violation of a constitutional *right* for § 2254(a) purposes, the availability of a *remedy* – in the form of issuance of the writ of habeas corpus – is controlled by § 2254(d).[4] The statute provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that

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[3] *See also, e.g.*, (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("Under § 2254(d)(1)'s 'unreasonable application' clause, ... a federal habeas court may not issue the writ *simply because* that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must *also* be unreasonable.") (emphases added); *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (§ 2254(d) "sets forth a precondition to the grant of habeas relief (...) not an entitlement to it").

[4] By controlling remedy-availability rather than right-determination, § 2254(d) stays clear of the territory already occupied by § 2254(a) while limiting federal court intervention to cases meeting the specified statutory criteria. *Cf. Danforth v. Minnesota*, 552 U.S. 264, 290-291 (2008) ("It is important to keep in mind that our jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies."); *id.* at 291 (" A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial – only that no remedy will be provided in federal habeas courts.").

> was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

By its terms, § 2254(d) offers two routes to a remedy for the constitutionally injured prisoner: around it, or through it. If a constitutional violation found to exist under § 2254(a) was not "adjudicated on the merits in State court proceedings," then § 2254(d) does not limit the federal court's power to grant relief, and the prisoner need make no further showing (assuming merits review in federal court is not otherwise procedurally barred, and assuming the violation at issue is either actually or presumptively prejudicial).[5] *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534

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[5] For the reasons set forth in the Brief of Respondent and the Brief for California Attorneys for Criminal Justice, Richter's *Strickland* claim is in this category.

(2003). If, on the other hand, the prisoner's claim was adjudicated on its merits by a state court, then § 2254(d) is implicated, and must be dealt with before the writ may issue.

Whereas § 2254(a) is concerned with the existence *vel non* of the constitutional violation alleged by the prisoner, § 2254(d)'s limitation on the habeas remedy looks to the state court's handling of the claim in an earlier proceeding. Starting from a presumption that state courts are generally competent adjudicators of federal rights whose judgments warrant respect,[6] § 2254(d) sets *denial* of a remedy as the default outcome in a federal habeas case ("An application for a writ of habeas corpus ... shall not be granted ...."). Recognizing that the presumption of state court competence does not always hold true, however, the statute also enumerates a set of potential defects which, when found in the "adjudication" that "resulted in" the state court's "decision," indicate that the prisoner's claim was not competently (as distinct from *correctly*) decided by the state court, and permit issuance of the writ ("shall not be granted ... unless ..."). Thus, where a federal court has found constitutional error satisfying § 2254(a), § 2254(d)(1) and (2) require an examination of how and why the state court failed to recognize and remedy the error. If the state court's erroneous outcome resulted from a failure to adhere to governing law or decision-making norms, then § 2254(d) permits the federal court to intervene. But, when the state court has produced a competently rendered decision with which the federal court simply disagrees, then § 2254(d) requires that the federal court leave the state court's decision undisturbed.[7] While this scheme often results in deferential treatment of the state court's denial of a federal constitutional claim, the plain language of the statute permits that deference only after the federal court has satisfied itself that the state court's work in adjudicating the prisoner's claim met the criteria prescribed in § 2254(d)(1) and (2).

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[6] *See, e.g., Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (criticizing court of appeals' "readiness to attribute error" to state court as "inconsistent with the presumption that state courts know and follow the law").

B. The inquiries mandated by the language of section 2254(d)(1) and (2).

Pursuant to § 2254(d)(1) and (2), a state court's merits decision denying relief must be upheld against a federal court's finding of constitutional error "unless" the adjudication that produced the state court decision: "was contrary to ... clearly established federal law," § 2254(d)(1); or "involved an unreasonable application of[] clearly established federal law," § 2254(d)(1); or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," § 2254(d)(2). Together these characteristics cover the spectrum of analytical missteps and deviations from decision-making norms that a state court can commit while adjudicating a prisoner's claim of constitutional error.

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[7] *See, e.g.*, *Brown v. Payton*, 544 U.S. 133, 143 (2005) ("Even on the assumption that [the state court's] conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review.").

To determine whether a given state court decision contains any of the defects enumerated in § 2254(d)(1) or (2), the federal court looks to the *process* used by the state court in adjudicating a constitutional claim. This is reflected with particular clarity in the statute's second and third categories ("involved an unreasonable application" and "was based on an unreasonable determination of the facts"), both of which incorporate past participles ("involved" and "was based on") explicitly directing the inquiry, not at the state court *outcome*, but at the subsidiary findings and reasoning which *produced* that outcome. To follow the mandate of § 2254(d)(1)'s "involved an unreasonable application of" clause, the federal court must know, *e.g.*, whether the state court understood the scope of the governing rule, what factors the state court considered in applying the rule, and what evidence the state court deemed relevant to the rule's application. A federal court answering § 2254(d)(2)'s "was based on an unreasonable determination of the facts" question must know, *e.g.*, what evidence the state court did and did not acknowledge or credit, what inferences the state court drew or failed to draw from the evidence, and the relative weight assigned to particular items or classes of evidence. And to apply § 2254(d)(1)'s "was contrary to" clause, the federal court must ascertain the rule or legal principle selected and relied upon by the state court.

This Court's own decisions illustrate the analyses that must be performed to answer the statutory inquiries. In *(Terry) Williams*, the Court held that § 2254(d)(1)'s "was contrary to" clause is satisfied where "the state court applies a rule that contradicts the governing law set forth in our cases," or where "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams*, 529 U.S. at 405-406. In applying this construction, the Court has consistently looked to the content of the state court's decision for an express statement of the rule chosen by that court, or for other indicators from which to infer that the state court's rule of decision was consistent with the governing federal principles. In *Williams* itself, the Court looked to "[t]he Virginia Supreme Court's own analysis of prejudice" and found it "contrary to" *Strickland* because it "mischaracterized at best the appropriate rule," such that the resulting "decision turned on [the state court's] erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Williams*, 529 U.S. at 397. After a similar examination of the content of the state court's decision in *Woodford v. Visciotti, supra,* the Court rejected the Ninth Circuit's determination that the state court's decision "was contrary to" federal law because that determination rested upon a "mischaracterization of the state court opinion, which expressed and applied the proper standard for evaluating prejudice." *Visciotti*, 537 U.S. at 22.

Section 2254(d)(1)'s "involved an unreasonable application of" clause has been construed to authorize habeas relief where "the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and where "the state court either unreasonably extends a legal principle ... to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. Here again, this Court has consistently looked to and relied upon the content of the state court's opinion for signs that the court did or did not reasonably apply the governing rule. For example, in *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), the Ninth Circuit's grant of relief on a jury coercion claim was overturned because, although the state court's opinion did not cite federal law, its reasoning reflected an application of principles at least as favorable to the petitioner as those prescribed by federal law, and the "fair import of the [state] Court of Appeal's opinion" was that it had considered all of the relevant facts. *Early*, 537 U.S. at 8-9; *see also id.* ("Avoiding the[] pitfalls [of § 2254(d)(1)] does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the *reasoning nor the result* of the state-court decision contradicts them.") (second emphasis added). Similarly, in *Williams*, this Court's determination that the Virginia Supreme Court "failed to evaluate the totality of the available mitigation evidence" rested on the content of the state court's opinion. *Williams*, 529

U.S. at 397.[8]

Additionally, although this Court has had fewer occasions to illustrate its application, the approach to § 2254(d)(2)'s "was based on an unreasonable determination of the facts" clause is the same. In *Wiggins*, for example, the state court's opinion revealed that its rationale for denying relief included a mistaken belief that certain records available to trial counsel contained information from which counsel could have made an informed decision to limit their investigation. After recognizing that the records did not contain the information attributed to them by the state court, this Court concluded under §2254(d)(2) that the state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of [its] decision." *Wiggins*, 539 U.S. at 528; *see also Wood v. Allen*, 130 S.Ct. 841, 849-850 (2010) (finding state court's express factual findings concerning trial counsel's strategy reasonable after detailed review of record on which they were based).

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[8] *Accord, e.g., Renico v. Lett*, 130 S.Ct. at 1865 ("[T]he Michigan Supreme Court's decision ... – while not necessarily correct – was not objectively unreasonable. Not only are there a number of plausible ways to interpret the record of Lett's trial, but the standard applied by the Michigan Supreme Court ... is a general one, to which there is no 'plainly correct or incorrect' answer in this case."); *Porter v. McCollum*, 130 S.Ct. 447, 454-455 (2009) (finding Florida Supreme Court's decision "unreasonable" because that court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 257-258 (2007) (state court's "formulation of the issue" and inattention to "the fundamental principles established by [this Court's] most relevant precedents, resulted in a decision that was both 'contrary to' and 'involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'"); *Rompilla*, 545 U.S. at 388-389 (2005) (Pennsylvania state post-conviction courts' superficial review of trial counsel's investigation "fail[ed] to answer the considerations" relevant to the *Strickland* deficient performance inquiry, and was therefore "objectively unreasonable"); *Wiggins*, 539 U.S. at 527 (Maryland Court of Appeals' decision involved an unreasonable application of *Strickland* because its reasoning showed it had "merely assumed that [trial counsel's] investigation was adequate").

In sum, while this Court's decisions applying § 2254(d) have involved a variety of constitutional claims, and have resulted in both grants and denials of habeas relief, they all share a common characteristic: the § 2254(d) analyses have always been substantially informed by the content of the relevant state court decision. This is no accident, for the questions considered and resolved by this Court in § 2254(d) cases all arise naturally and directly from the plain language of subparts (d)(1) and (2), and none of them can be answered without reference to the content of the state court decision.

II. Section 2254(d) cannot accommodate a summary state court disposition of a constitutional claim.

The inquiries called for by §2254(d)'s "adjudicated on the merits" clause, and by subparts (1) and (2), are relatively straightforward when the federal court can discern the issues resolved by the state court, and the rationales supporting the state court's decision. When that information is unavailable, however, a federal court lacks the resources necessary to make the assessments the statute requires.[9]

A. The impossibility of discerning which components the state court actually "adjudicated."

On its face, § 2254(d) applies only to a "claim that was adjudicated on the merits in State court proceedings." When a state court fails to indicate which of a claim's components were actually reached, however, it is impossible to determine how much of "the merits" were in fact "adjudicated" for § 2254(d) purposes.[10] Richter's *Strickland* claim is a good illustration. If the state court adjudicated the merits at all, it may have held that Richter had not shown deficient performance, or it may have believed he had not been prejudiced; neither Richter nor this Court will ever know for sure.

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[9] The Warden and his *amici* offer a portrayal of federal habeas courts awash in summary state court orders. As explained in the Appellate Advocacy Scholars' *Amicus Curiae* brief, these claims are vastly overblown. Most habeas claims arrive in federal court having previously been rejected in decisions susceptible to meaningful review under § 2254(d)(1) and (2). Many are addressed in reasoned state appellate court decisions; others have been addressed in reasoned lower court decisions to which a federal habeas court can "look through," *see, e.g., Berghuis v. Thompkins*, 130 S.Ct. at 2258-2259 (noting that "[t]he Michigan Supreme Court denied discretionary review," and that "[t]he relevant state-court decision here is the Michigan Court of Appeals' decision affirming Thompkins's conviction ...."); and the reasoning underlying still other purportedly summary dispositions can be easily gleaned from the trial record, *see, e.g., Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d 1027, 1038 (9th Cir. 2005) ("The last-reasoned state-court decision here – and, thus, the decision that we review – is the trial court's."). Thus, cases involving nothing but a summary state court merits disposition are truly the exception, not the rule.

The Warden proposes to resolve this mystery through an assumption that the California Supreme Court adjudicated "Richter's entire claim in denying relief." Pet. Br. 33. While this assumption would serve the Warden's interest in maximizing the burden on Richter, it would almost certainly be wrong. In *Strickland*, 466 U.S. at 697, this Court explained that "there is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one." Given such a clear instruction, it is much more likely that, if it reached the merits at all, the

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[10] *See Bell v. Cone*, 543 U.S. 447, 460-461 (2005) (per curiam) (Ginsburg, J., joined by Souter and Breyer, JJ., concurring) ("This Court's opinion ... does not grapple with the following scenario: A state prisoner petitions for federal habeas review after exhausting his state remedies. In the anterior state proceeding, the prisoner raised multiple issues. The state court, in disposing of the case, left one or more of the issues unaddressed. There would be no warrant, in such a case, for an assumption that the state court, *sub silentio*, considered the issue and resolved it on the merits in accord with the State's relevant law. Nothing in the record would discount the possibility that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point.").

California Supreme Court decided no more than one of *Strickland*'s components in Richter's case.[11] Thus, indulging the Warden's assumption would result in application of § 2254(d) to an issue that was never "adjudicated on the merits" by the state court. As this Court has already made clear, that would be forbidden. *See Porter*, 130 S.Ct. at 452 ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*."); *Wiggins*, 539 U.S. at 534 ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."); *Rompilla*, 545 U.S. at 390 ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*.") (internal citation omitted).

B. Speculation is not a permissible substitute for real analysis.

Purporting to follow the "plain language of the statute," the Warden contends that "[t]he only prerequisite to obtaining deferential review is that the claim 'was *adjudicated on the merits* in State court proceedings ...."' Pet. Br. 25. As to how such "review" should proceed when the state court has provided only a summary denial, the Warden proposes that the federal court should "assume[] that the state court applied the proper 'clearly established federal law,' and then determine[] whether its decision was 'contrary to' or was 'an unreasonable application of' that law." Pet. Br. 23. This cannot be correct.

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[11] *See, e.g., In re Scott*, 29 Cal.4th 783, 825 (Cal. 2003) ("We need not decide whether competent counsel should have investigated further, for we find no prejudice in the failure to do so."); *In re Ross*, 10 Cal.4th 184, 204 (Cal. 1995) ("Finding no prejudice, we do not address the question of counsel's performance.").

Read in isolation, § 2254(d)'s opening lines do suggest that the only prerequisite to its applicability is a determination that the "claim ... was adjudicated on the merits in State court proceedings." If the statute ended there (and setting aside the ambiguity problem discussed above), then an unexplained state court decision might arguably come within § 2254(d)'s reach. But the statute does not end with the "adjudicated on the merits" clause. Rather, it goes on to require that a federal court check the accuracy of the federal rule selected by the state court, and assess the reasonableness of both the "*application[s]*" of federal law "*involved*" in the state court decision, and the "*determination[s] of the facts*" that the state court decision "*was based on.*"[12] While it may serve the Warden's purposes to ignore these features of the statute, this Court must give them meaning, and must do so in a way that avoids perverse results that the statutory text does not support. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (rejecting a proposed construction of AEDPA because its "implications for habeas practice would be far reaching and seemingly perverse"); *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *Sheridan v. United States*, 487 U.S. 392, 402 n.7 (1988) ("courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading").

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[12] Like the Warden and his *amici*, the federal courts of appeals they cite as endorsers of their proposal, *see* Pet. Br. 25-26; CJLF Br. 17-18, have uniformly failed to articulate a method of applying the statute to summary denial cases that actually gives meaningful effect to the specific inquiries mandated by § 2254(d)(1) and (2).

Taking the plain meaning of subparts (d)(1) and (2) into account, the Warden's suggestion that a federal court "assume[] that the state court applied the proper 'clearly established federal law,' and then determine[] whether its decision was 'contrary to' or was 'an unreasonable application of' that law," Pet. Br. 23, does not work. To begin with, § 2254(d)(1)'s "was contrary to" clause requires a federal court to decide for itself whether "the state court applie[d] a rule that contradicts the governing law set forth in [this Court's] cases." *Williams*, 529 U.S. at 405-406. To forego that statutorily mandated inquiry in favor of an assumption that the state court selected the appropriate federal rule would be to effectively read "was contrary to" out of the statute.[13] That would not only violate basic rules of statutory construction,[14] it would also fundamentally alter the scheme Congress established by eliminating the only means of securing habeas relief enumerated in § 2254(d) that does not require any showing of unreasonableness on the part of the state court.[15]

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[13] If the Virginia Supreme Court in *Williams* had not disclosed its reasoning, and if this Court had followed the Warden's approach, the state court's misuse of *Lockhart v.*

The reasonableness assessments prescribed by § 2254(d)(1) and (2) would fare no better under the Warden's proposal. A federal court applying § 2254(d)(1) must be able to assess the "application" of federal law that was actually "*involved*" in the state court's adjudication.[16] And a federal court applying §

Fretwell, 506 U.S. 364 (1993), would never have come to light. Instead, this Court would have assumed – incorrectly – that the state court selected the correct rule, and Williams' entitlement to relief under § 2254(d)(1)'s "contrary to" clause would have been missed.

[14] *See, e.g., Barber v. Thomas*, ___S.Ct.___, 2010 WL 2243706, at *10 (June 7, 2010) ("Because the dissent's approach would require us to read words out of the statute, ... its definition cannot be used here."); *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (internal quotation marks omitted).

[15] The Warden's suggestion that a "contrary to" inquiry would still be performed under its proposal makes no sense. As a practical matter, no court could first "assume[]" the state court chose the correct law, and then "determine whether" it did so. Pet. Br. 23. The issue would always be resolved by the assumption, and § 2254(d)(1)'s "was contrary to" clause would be rendered a nullity.

[16] As illustrated by this Court's decisions, discussed *supra*, the "involved an unreasonable application" inquiry often turns on matters such as whether the state court understood the scope of

2254(d)(2) must see the factual determinations the state court decision actually "*was based on*" before it can assess their reasonableness.[17] Nothing in the language of the statute suggests that these inquiries can or should be replaced by the rank speculation that would be necessary to subject a summary denial to § 2254(d)(1) and (2) analysis.[18] *See Wiggins*, 539 U.S. at

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the governing rule, what factors the state court considered in applying the rule, and what evidence the state court considered relevant to application of the rule.

[17] If the Maryland Court of Appeals had not issued a reasoned decision in *Wiggins*, this Court would never have known that the state "court based its conclusion, in part, on a clear factual error" satisfying §2254(d)(2). *Wiggins*, 539 U.S. at 528. The defect in the state court's decision would still have existed, but it would have gone undetected.

[18] While it is fair to say that § 2254(d) reflects an implicit presumption of state court competence to adjudicate federal constitutional claims, it is also clear that the statute makes this presumption rebuttable through satisfaction of the conditions enumerated in (d)(1) and (d)(2). Under the Warden's proposal, however, the presumption would be virtually irrebuttable. It is one thing to withhold relief until a prisoner shows both a constitutional violation and a discernable defect in a state court's decision refusing to recognize or remedy that violation. But it is quite another to encourage federal courts to hypothesize reasons for a state court's decision, and then announce them for the first time in a decision denying relief on the basis that the prisoner failed to imagine and rebut those reasons himself. That is a far more draconian scheme than the plain language of § 2254(d) can support, and one that would violate due process. *See, e.g., Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (irrebuttable presumption is one that, although not universally true, cannot be rebutted with competent individualized evidence; such presumptions violate federal due process).

529 (dismissing state's proffer of *post hoc* rationale for Maryland Court of Appeals' decision as having "no bearing" on § 2254(d) analysis).

C. Applying § 2254(d) to summary dispositions would yield perverse results.

The language and structure of § 2254(d) suggest that Congress' objective in enacting it was to heighten state courts' involvement in and responsibility for accurate, thoughtful resolution of federal constitutional claims. *See Woodford v. Visciotti*, 537 U.S. at 27 (per curiam). Sanctioning application of § 2254(d) to summary decisions – particularly in the manner proposed by the Warden – would result in a perverse incentive structure that would turn that goal on its head. A state court conscientious enough to analyze a prisoner's federal claims and articulate the bases for its decision would subject its reasoning and conclusions to the scrutiny of a federal court making the inquiries prescribed by § 2254(d)(1) and (2). A state court which merely declares that the merits of a prisoner's claims – no matter how numerous, complex or debatable – are "denied," however, would get the benefit of every doubt, from whether the court even understood and reached each claim and its components, to whether the court chose the appropriate rule of decision, to whether the court reasonably applied that rule to facts reasonably found from the state court record. Such a regime would both undermine the legislative premise upon which passage of § 2254(d) was made possible, and increase the number of federal habeas cases resolved through rank speculation rather than accurate analysis.[19] Neither of these outcomes could be characterized as anything other than perverse.

* * *

Perhaps Congress proceeded on the assumption that state courts take federal constitutional claims too seriously to dispose of them without comment.[20] Or perhaps Congress simply did not speak as clearly as it could have.[21] Whatever the explanation, the only way to give effect to both the "adjudicated on the merits" clause and the specific inquiries mandated in subparts (d)(1) and (2) is to construe the statute as a whole to apply only to claims (or their components) about which the state court has disclosed its reasoning.

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[19] A decision by this Court endorsing the Warden's proposal would inevitably trigger a rise in state courts' use of summary merits dispositions in jurisdictions where they are permitted. States' attorneys would waste no time alerting the state courts to the benefits of saying nothing about the reasons for rejecting constitutional claims, and many state judges would respond to these incentives by utilizing summary dispositions.

[20] That assumption would be consistent with the prevailing legislative sentiment that state courts are competent adjudicators of federal claims. *See* 142 Cong. Rec . S3447 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("There is simply no reason that federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts.").

[21] *Cf. Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("No answer leaps out at us. All we can say is that in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting.").

III. Limiting application of § 2254(d) to state court decisions actually susceptible to review imposes no undue burden on state courts, and would not undermine finality, comity or federalism.

Limiting the application of § 2254(d) to state court decisions whose reach and reasoning can be discerned does not offend the comity and federalism interests underlying AEDPA or place any undue burden on state courts.[22] For the vast majority of state courts, issuance of reasoned decisions is standard operating procedure, and eligibility for the protection afforded by § 2254(d) is an incidental benefit. State courts willing to forego that benefit in exchange for the freedom not to explain their decisions on matters of federal constitutional law remain free to do so. *Cf.* *(Michael) Williams v. Taylor*, 529 US. 420, 443 (2000) ("We do not suggest the State has an obligation to pay for investigation of as yet undeveloped claims; but if the prisoner has made a reasonable effort to discover the claims ..., § 2254(e)(2) will not bar him from developing them in federal court"); *Harris v. Reed*, 489 U.S. 255, 266 (1989) (adopting presumption against procedural bar to federal habeas review absent "plain statement" that state court decision rested on adequate and independent state ground).

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[22] The Warden asserts that "[n]either the language of the statute, nor the policies underlying the writ-restricting reforms enacted in AEDPA, demonstrate any intent on the part of Congress to require state courts to justify their rulings." Pet. Br. 23. This assertion rests on a faulty premise. The issue is not whether "Congress [has] require[d] state courts to justify their rulings." Pet. Br. 23. Of course it hasn't. State courts are as free as they have always been to say as much or as little as they like about why they resolve federal claims the way they do. Instead, the issue is whether, by choosing not to disclose its reasoning, a state court may force a federal court to give *blind* deference under a statute which authorizes only *informed* deference, or no deference at all. As we have demonstrated, the plain language of the statute establishes that the answer must be no.

Furthermore, although § 2254(d) is an important part of the post-AEDPA federal habeas scheme, it is not the sole mechanism for safeguarding states' interests in finality, comity and federalism. On the contrary, even where a state court chooses not to describe the reasoning underlying its decision on a federal constitutional claim, a prisoner seeking federal habeas relief still faces a demanding set of requirements. For example, prisoners remain obligated in all cases to fairly present their constitutional claims to the state courts, *see* 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), and to make diligent efforts to develop the facts in support of those claims before the state courts, *see* 28 U.S.C. § 2254(e)(2); (*Michael*) *Williams v. Taylor*, *supra*. States' interests in the enforcement of their own rules continue to be protected by the procedural default doctrine. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977). States' reliance upon the law as it stood at the time of the state court decision continue to be safeguarded by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288, 301 (1989). *See also Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam) ("[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."). For many constitutional violations, moreover, relief remains unavailable absent a finding that the "error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 551 U.S. at 120.

In short, a determination that § 2254(d) should not be applied where the state court has made doing so impracticable would remove only one of a formidable array of barriers to habeas relief. The barriers that remain would provide ample protection to the minority of state courts – chief among them, the California Supreme Court – that choose to reject claims of federal constitutional error without disclosing their reasons for doing so.

IV. If § 2254(d) is construed to apply to summary state court decisions, the attendant practical difficulties must be addressed.

If § 2254(d) were construed to apply to summary state court dispositions (and for the reasons discussed above, it should not be), the impracticability of conducting the analyses required by § 2254(d)(1) and (2) in such cases must be accounted for. The accommodation most reconcilable with the statute would require that, where the state court decision is partially or fully reasoned, a federal court should credit the state court's rationales – those that appear expressly and those that can be confidently inferred – when performing the § 2254(d) analysis, just as this Court's decisions have illustrated. But to the extent the state court decision is unreasoned, the federal court would first be obligated to independently assess the merits of the constitutional question under § 2254(a). If that independent assessment were to reveal a constitutional violation, the federal court would not be obliged to assume that the state court's result, though decidedly wrong, was nevertheless produced by an analysis that was consistent with or involved a reasonable application of clearly established federal law, and was based on a reasonable determination of the facts. Instead, the federal court would be permitted to make the more natural and intuitive assumption that a state court decision which reaches an incorrect result on an issue of federal constitutional law, and does not even undertake to explain that result, is tainted by at least one of the defects enumerated in § 2254(d)(1) and (2). The combination of constitutional error found under § 2254(a) and adjudicatory defect inferred under § 2254(d) would authorize issuance of the writ.

V. Application of § 2254(d) in connection with the question of Richter's counsel's deficient performance would also be inappropriate because evidence material to that issue was considered for the first time in federal court.

In *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam), this Court recognized that, "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer [under § 2254(d)]." While the Court has yet to definitively address this issue,[23] support for the approach noted in *Holland* has not abated. *See, e.g.*, *Winston v. Kelly*, 592 F.3d 535, 555-556 (4th Cir. 2010) ("If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)."); *Wilson v. Workman*, 577 F.3d 1284, 1293 (10th Cir. 2009) ("To be entitled to deference under AEDPA, the state court must ... decide the 'substance' of the claim, which means to 'apply controlling legal principles to the facts bearing upon [his] constitutional claim.' To dispose of a claim without considering the facts supporting it is not a decision on the merits.") (quoting *Picard v. Connor*, 404 U.S. 270, 277 (1971)); *Taylor v. Maddox*, 366 F.3d 992,

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[23] Certiorari was granted to address this question in *Bell v. Kelly*, 553 U.S. 1031 (2008), but the writ was dismissed as improvidently granted shortly after oral argument, *Bell v. Kelly*, 129 S.Ct. 393 (2008). A variant of the same issue appears to be present in *Cullen v. Pinholster*, ___S.Ct.___, 2010 WL 887247 (June 14, 2010) (order granting certiorari); *see also* Petition for Writ of Certiorari at 13, *Pinholster* (No. 09-1088) (arguing that "[t]he statutory language [of § 2254(d)] ... dictates that the state adjudication must be reviewed only in light of the facts as presented or alleged in the state court"); *id.* at 14 (arguing that language from (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 407-408 (2000), "would seem to rule out inquiry into facts the state court never saw" during application of § 2254(d)).

999 (9th Cir. 2004) (§ 2254(d)(2) "applies most readily to situations where petitioner challenges the state court's findings based entirely on the state record.").

In this case, Richter sought discovery and an evidentiary hearing in state court, J.A. 31, the state responded with a request for summary denial, Informal Reply at 3, and the state court denied the petition without ruling on Richter's request for fact development, Pet. App. 22a. Later, as described in Richter's brief, the federal district court ordered a deposition of trial counsel, and the parties stipulated to the admission of that deposition into the federal court record. ER 399. Among other things, trial counsel acknowledged that his failure to consult with or otherwise prepare to utilize expert witnesses to support the theory of the case he articulated in his opening statement had not been strategic. *See* ER 245; 289-290. Rather, counsel omitted these critical steps simply because he did not consider utilizing a blood spatter expert. *See* 289-290. As the court of appeals recognized, this testimony by counsel was – and remains – highly material to a proper assessment of whether his decision to go to trial without expert assistance was constitutionally deficient. *See Richter v. Hickman*, 578 F.3d 944, 958-959 (9th Cir. 2009) (en banc) ("In his deposition, counsel was unable to provide any reasoned explanation for failing to consult forensic experts or to seek expert testimony in order to corroborate his client's testimony or prepare to rebut the prosecution's case. ¶ Certainly, he did not suggest that any strategy explained that failure.").

If the California Supreme Court adjudicated the merits of Richter's ineffective assistance claim, and if, in doing so, it reached *Strickland*'s "deficient performance" prong, its decision rested on what must now be recognized to have been a materially incomplete record. Proceeding without trial counsel's deposition testimony, the state court likely assumed counsel had made an informed, strategic decision to go forward without expert assistance.[24] In light of trial counsel's deposition testimony, however, that assumption would have been wrong. Thus, even if the state court's summary order constitutes an adjudication "on the merits," those "merits" changed materially in the federal district court proceeding that followed. As a result, "there is no relevant state-court determination to which one could defer," *Holland*, *supra*, and application of § 2254(d) in connection with the deficient performance component of Richter's claim would be inappropriate.

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[24] *See, e.g.*, *People v. Jones*, 64 P.3d 762, 778 (Cal. 2003) ("In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.").

CONCLUSION

WHEREFORE, for the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers supports Richter's request that the grant of habeas relief be affirmed, and urges the Court to hold that 28 U.S.C. § 2254(d) is inapplicable to the summary disposition issued by the California Supreme Court in this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

KELLY HARRINGTON, WARDEN, PETITIONER

v.

JOSHUA RICHTER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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In The

Supreme Court of the United States

No. 09-587

KELLY HARRINGTON, WARDEN, PETITIONER

v.

JOSHUA RICHTER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

As direct beneficiaries of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), amici States have an interest in promoting "the principles of comity, finality, and federalism" that motivated Congress to enact the statute. *Michael Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). The question presented in this case concerns 28 U.S.C. 2254(d)(1), a provision "Congress viewed * * * as an important means by which its goals for habeas reform would be achieved." *Terry Williams* v. *Taylor*, 529 U.S. 362, 404 (2000). In deciding whether to accord Section 2254(d)(1)'s "AEDPA deference" to summary dispositions, this Court will influence the conduct of judicial business in state and federal courts across the country. Accordingly, thirty-three amici States respectfully submit this brief in support of petitioner.

SUMMARY OF ARGUMENT

In granting the petition for a writ of certiorari, the Court asked, "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984)?" *Harrington* v. *Richter*, 130 S. Ct. 1506, 1506-1507 (2010). Amici States urge the Court to answer its question in the affirmative. Summary dispositions are common in many state courts. To date, most federal courts have properly accorded AEDPA deference to these summary dispositions, as required by the text of 28 U.S.C. 2254(d)(1) itself. A contrary holding by this Court would have harmful implications for our federal system. This Court should reverse the judgment of the Ninth Circuit and confirm that AEDPA deference applies to all state-court decisions, including summary dispositions.

ARGUMENT

The phrase "AEDPA deference" describes a complex relationship between state and federal courts in the habeas context. A federal court entertaining a state prisoner's habeas petition does not sit to review a state court's judgment. See *Lambrix* v. *Singletary*, 520 U.S. 518, 523 (1997); *Schechtman* v. *Foster*, 172 F.2d 339, 341 (2d Cir. 1949) (L. Hand, J.). But neither are state-court proceedings irrelevant on federal habeas review under AEDPA. The pertinent statute provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim * * * resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States * * * .

28 U.S.C. 2254(d)(1).

Although the word "deference" does not appear in the text, deference is plainly contemplated by the statute, as this Court has repeatedly recognized. See, *e.g.*, *Renico* v. *Lett*, No. 09-338, slip op. at 6 n.1 (U.S. May 3, 2010) (collecting cases in which the term "deference" is used "to describe the effect of the threshold restrictions in 28 U.S.C. § 2254(d) on granting federal habeas relief to state prisoners"); *Bell* v. *Cone*, 543 U.S. 447, 447 (2005) (per curiam) (noting "the deference [to state courts] required by 28 U.S.C. § 2254(d)"); *Lindh* v. *Murphy*, 521 U.S. 320, 333 n.7 (1997) (noting "§ 2254(d)'s highly deferential standard for evaluating state-court rulings"). Once a state court adjudicates the merits of a prisoner's claim, a federal court is powerless to grant habeas relief unless the state court's decision runs afoul of this Court's clearly established precedent. Thus constrained by statute, a federal court must forgo de novo consideration and defer to a state court, even though the latter may be incorrect on a point of federal law. See *Terry Williams* v. *Taylor*, 529 U.S. 362, 410-411 (2000).

The Court has asked whether this limitation on federal judicial power vanishes when a state court resolves a case by "summary disposition"—that is, where judgment is unaccompanied by an opinion that explains the court's reasons for denying a particular federal claim. *Harrington* v. *Richter*, 130 S. Ct. 1506, 1506-1507 (2010) (posing this question); see also *Smith* v. *Spisak*, 130 S. Ct. 676, 688 (2010) (declining to resolve this question). Amici States submit that summary dispositions, of which there are many, are no less worthy of AEDPA deference than any other state-court decisions.

A. State Courts Across The Country Deliver Summary Dispositions

The ineffective-assistance claim that respondent urges in his federal habeas petition was addressed by summary disposition in the courts of California. *Richter* v. *Hickman*, 578 F.3d 944, 951 n.5 (9th Cir. 2009) (en banc) ("Here, the California Supreme Court denied Richter's habeas petition in one sentence, without providing any reasoning for its decision. No other state court commented on Richter's claim * * * ."). According to petitioner, Pet'r Br. 29-30 & n.9, such summary dispositions are common in California state courts.

California is not unusual in this regard. In Texas, for example, the Court of Criminal Appeals has denied thousands of habeas applications in non-capital cases without written order. See, *e.g.*, *Court of Criminal Appeals Activity: FY 2009*, at 2, available at http://www.courts.state.tx.us/pubs/AR2009/cca/cca-activity-report-2009.pdf (reporting 946 denials of habeas relief without written order); *Court of Criminal Appeals Activity: FY 2008*, at 2, available at http://www.courts.state.tx.us/pubs/AR2008/cca/cca-activity-report-2008.pdf (reporting 1058 denials of habeas relief without written order); *Court of Criminal Appeals Activity for the Year Ended August 31, 1996*, at 5 (reporting 2704 denials of habeas relief without written order). This shared trait of Texas and California predates AEDPA's enactment. See Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev. 237, 262 (1995) (reporting that, in a study of state courts in Alabama, California, New York, and Texas, "about seventy-five percent of [habeas] petitions were dismissed or denied summarily without a reason").

Summary dispositions are found in other States. See, *e.g.*, Administrative Office of Courts, *Alabama Unified Judicial System: FY 2008 Annual Report & Statistics* 8, available at http://www.alacourt.gov/Annual%20Reports/2008AOCAnnualReport.pdf (noting that state supreme court issued 1506 decisions without opinion and 252 decisions with opinion, in disposing of 698 direct appeals); Office of the Administrative Director, *Alaska Court System: Annual Statistical Report* 8, 14 (2009), available at http://www.courts.alaska.gov/reports/annualrep-fy09.pdf (noting that state supreme court issued 120 dispositions by published opinion and 40 summary dispositions on merits, while state court of appeals issued 48 dispositions by published opinion and 157 summarily on merits); Hon. Chase T. Rogers, *Biennial Connecticut Judicial Branch Report and Statistics 2006-2008*, at 37, available at http://www.jud.ct.gov/Publications/BiennialReport2006-08.pdf (noting that state appellate courts disposed of 298 criminal appeals by opinion and 101 criminal appeals by other means); District Court of Appeal Workload and Jurisdiction Assessment Committee, *Report and Recommendations* appendix A (Nov. 2006), available at http://www.floridasupremecourt.org/pub_info/documents/DCAWorkload/2006_DCAReport.pdf (noting that, in Florida appellate courts, 38.0% of criminal cases and 65.8% of post-conviction cases were disposed of by short, per curiam affirmance); Hon. Ronald T.Y. Moon, *The Judiciary, State of Hawai'i: 2009 Annual Report Statistical Supplement* tbl. 1, available at http://www.courts.state.hi.us/docs/news_and_reports_docs/annual_reports/Jud_Statistical_Sup_2009.pdf (noting that state supreme court and court of appeals decided 19 criminal cases by published opinion, 19 criminal cases by memorandum opinion, and 160 criminal cases by summary disposition order); Administrative Office of the Illinois Courts, *Annual Report of the Illinois Courts: Statistical Summary* 130 (2008), available at http://www.state.il.us/court/SupremeCourt/AnnualReport/2008/StatsSumm/2008_Statistical_Summary.pdf (reporting that of 3755 criminal cases disposed by state appellate court, 850 were disposed of without written opinion or order); Hon. Gerald W. VandeWalle, *2009 Annual Report: North Dakota Court System* 9, available at http://www.ndcourts.gov/_court/News/ndcourtsar2009.pdf (noting that state supreme court disposed of 130 criminal cases, 34 of them by summary disposition); Wisconsin Court System, *Court of Appeals Annual Report* 3 (2009), available at http://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=47578 (noting that 28% of total case terminations in state courts of appeals were by summary disposition);

Court Statistics Project, *State Court Caseload Statistics: An Analysis of 2007 State Court Caseloads* tbl. 16 (2009) (describing opinions reported by state appellate courts across the country). Some States explicitly provide by rule for summary dispositions in their courts. See, *e.g.*, Ala. R. Crim. P. 32.7(d); Ariz. R. Crim. P. 32.6(c); Del. Super. Ct. R. Crim. P. 61(d)(4); N.D. R. App. P. 35.1; Utah R. Civ. P. 65C(h)(1).

The foregoing materials illustrate the most obvious form of state-court summary disposition, in which an entire case is dispatched without opinion. Another form of summary disposition is the otherwise lengthy opinion that notes a state court's denial of a federal claim without providing a rationale. See, *e.g.*, *Smith* v. *Spisak*, 130 S. Ct. 676, 688 (2010) (noting summary rejection of federal claim as "not well-taken" in state court); *Blankenship* v. *Hall*, 542 F.3d 1253, 1270-1271 (11th Cir. 2008) (noting summary rejection of federal claim as "without merit" in state court); *James* v. *Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) (same).

B. There Is Widespread Agreement Among The Federal Courts That Summary Dispositions Warrant AEDPA Deference Under Section 2254(d)

The prevalence of summary dispositions in the state courts has caused federal courts of appeals to consider whether such decisions are entitled to AEDPA deference. "Nearly every circuit has concluded that when a state court denies a federal constitutional claim but writes no opinion articulating its reasoning, the summary nature of a state court's decision does not lessen the deference that it is due." Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1262 (6th ed. 2009) [hereinafter *Hart & Wechsler*] (internal quotation marks omitted). The collective wisdom of the circuits may inform this Court's resolution of the question it has posed.

Several circuits have read the statutory text to require AEDPA deference for summary dispositions. Under 28 U.S.C. 2254(d)(1), federal habeas authority depends on an evaluation of the "decision" of a state court. A *decision* must be distinguished from an *opinion*, with the latter being an explanation offered in support of the former. See John Chipman Gray, *The Nature and Sources of the Law* 261 (2d ed. 1921) ("In order that an opinion may have the weight of a precedent, * * * it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*."); Note, *Decisions Without Opinions*, 34 Harv. L. Rev. 314, 315 (1921) (referring to "an opinion as distinguished from the actual decision"). The circuits have noted the import of Congress's word choice. *E.g.*, *Neal* v. *Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam) ("It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision."). As the Eleventh Circuit has explained:

> A judicial decision and a judicial opinion are not the same thing. * * * The statutory language focuses on the result, not on the reasoning that led to the result, and nothing in that language requires the state court adjudication that has resulted in a

> decision to be accompanied by an opinion that explains the state court's rationale.

Wright v. *Sec'y for Dep't of Corrs.*, 278 F.3d 1245, 1255 (11th Cir. 2002) (holding "plain language of § 2254(d)(1)" dictates AEDPA deference for summary dispositions); see also *Sellan* v. *Kuhlman*, 261 F.3d 303, 311-312 (2d Cir. 2001) (reaching same conclusion, based on "plain meaning of § 2254(d)(1)").

AEDPA deference to summary dispositions is also driven by considerations of comity. See *Wright*, 278 F.3d at 1255 ("Telling state courts when and how to write opinions to accompany their decisions is no way to promote comity."); *Bell* v. *Jarvis*, 236 F.3d 149, 158 (4th Cir. 2000) (en banc) ("[The] state court did not articulate the rationale underlying its rejection of [a federal] claim. However, we may not presume that [the] summary order is indicative of a cursory or haphazard review of [the] petitioner's claims." (internal quotation marks omitted)). Judge Posner has explained that review of a state court's articulated reasoning "would place the federal court in just the kind of tutelary relation to the state courts that [AEDPA is] designed to end." *Hennon* v. *Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). Other circuits have employed a schoolhouse analogy to illustrate this concern. See *Rashad* v. *Walsh*, 300 F.3d 27, 45 (1st Cir. 2002) ("It is not our function * * * to grade a state court opinion as if it were a law school examination. Rather, we review the state court's ultimate findings and conclusions to ascertain whether they constitute an unreasonable application of clearly established Supreme Court precedent."); *Wright*, 278 F.3d at 1255 ("Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era."); *Cruz* v. *Miller*, 255 F.3d 77, 86 (2d Cir. 2001) ("[W]e are determining the reasonableness of the state courts' 'decision,' 28 U.S.C. § 2254(d)(1), not grading their papers.").

The near-consensus amongst the lower courts is also consistent with prior rulings of this Court. In *Chadwick* v. *Janecka*, 312 F.3d 597, 605 (3d Cir. 2002), for example, a habeas petitioner argued that AEDPA deference did not apply because the state court had "denied relief without any statement of reasons at all." The Third Circuit rejected this argument as "contrary to Supreme Court precedent" on the subject of "summary dispositions." *Id.* at 605-606. Writing for the court, then-Judge Alito explained that *Weeks* v. *Angelone*, 528 U.S. 225, 237 (2000), "clearly held that the § 2254(d) standards apply when a state supreme court rejects a claim without giving any indication of how it reached its decision." *Chadwick*, 312 F.3d at 606 (internal quotation marks omitted). See also *Muth* v. *Frank*, 412 F.3d 808, 815 & n.6 (7th Cir. 2005) (noting *Weeks*'s deferential treatment of a state court's summary disposition); *Henderson* v. *Cockrell*, 333 F.3d 592, 598 (5th Cir. 2003) (same); *Bell*, 236 F.3d at 161 n.8 (same).

Accordingly, the circuits have overwhelmingly concluded that, under 28 U.S.C. 2254(d)(1), a federal habeas court must examine a state court's result, rather than its rationale. See, *e.g.*, *Clements* v. *Clarke*, 592 F.3d 45, 55-56 (1st Cir. 2010) ("It is the result to which we owe deference, not the opinion expounding it."); *Cruz*, 255 F.3d at 86 ("Several circuits have noted that, in making the 'reasonable application' determination, they would look to the result of a state court's consideration of a criminal defendant's claim."); *Schaetzle* v. *Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003) ("Because a federal habeas court only reviews the reasonableness of the state court's ultimate decision, the AEDPA inquiry is not altered when, as in this case, state habeas relief is denied without an opinion."); *Irick* v. *Bell*, 565 F.3d 315, 320 (6th Cir. 2009) ("[W]e must 'focus on the result of the state court's decision, applying' AEDPA deference to the result reached, not the reasoning used." (quoting *Harris* v. *Stovall*, 212 F.3d 940, 943 n.1 (6th Cir. 2000))); *Hough* v. *Anderson*, 272 F.3d 878, 897 n.7 (7th Cir. 2001) ("Under AEDPA, it is a state court's resolution of an issue, as opposed to its reasoning process, that must be treated with deference."); *Aycox* v. *Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999) ("[W]e owe deference to the state court's *result*, even if its reasoning is not expressly stated."); *Wright*, 278 F.3d at 1255 ("'The statutory language focuses on the result, not on the reasoning that led to the result * * * ."); cf. *Fullwood* v. *Lee*, 290 F.3d 663, 677 (4th Cir. 2002) ("When the state court decision being reviewed by a federal habeas court fails to provide any rationale for its decision, we still apply the deferential standard of review mandated by Congress [in AEDPA]."); *Brown* v. *Luebbers*, 371 F.3d 458, 462 (8th Cir. 2004) (en banc) ("[T]he 'summary nature' of the [state court's] discussion of the federal constitutional question does not preclude application of the AEDPA standard.").

The lone outlier on the subject of AEDPA deference for summary dispositions is the Ninth

Circuit, which appears to have crafted a curious brand of intermediate deference. See, *e.g.*, *Brazzel* v. *Washington*, 491 F.3d 976, 981 (9th Cir. 2007) ("We have relaxed AEDPA's strict standard of review when the state court reaches a decision on the merits but provides no reasoning to support its conclusion." (quoting *Pirtle* v. *Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002))); *Brown* v. *Palmateer*, 379 F.3d 1089, 1092 (9th Cir. 2004) (declaring that if the state court "provide[s] no *ratio decidendi* to review," the federal court "accord[s] the state court decision[] less deference than in standard habeas cases"); *Delgado* v. *Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (suggesting that, absent an opinion, a state-court decision does "not warrant the deference we might usually apply," and that "an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law" (quoting *Delgado* v. *Lewis*, 168 F.3d 1148, 1152 (9th Cir.), opinion withdrawn, 181 F.3d 1087 (9th Cir. 1999))). The opinion below declined to address this issue. *Richter* v. *Hickman*, 578 F.3d 944, 951 n.5 (9th Cir. 2009) (en banc) ("[W]e need not determine whether or when an unreasoned state court decision warrants AEDPA deference.").

Courts of the forty-one States outside the Ninth Circuit, see 28 U.S.C. 41, presently operate on the understanding that their summary dispositions will receive AEDPA deference on federal habeas review. To hold otherwise in this case would upset the sound precedent of most federal courts, along with the settled expectations of most state courts.

C. Denying AEDPA Deference To Summary Dispositions Would Offend The Principles Section 2254(d) Was Enacted To Promote

The general aim of AEDPA was to promote values of comity, finality, and federalism. *E.g.*, *Panetti* v. *Quarterman*, 551 U.S. 930, 945 (2007); *Day* v. *McDonough*, 547 U.S. 198, 208 (2006); *Mayle* v. *Felix*, 545 U.S. 644, 663 (2005); *Carey* v. *Saffold*, 536 U.S. 214, 220 (2002); *Duncan* v. *Walker*, 533 U.S. 167, 178 (2001); *Michael Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). Congress included Section 2254(d), which has been described as "AEDPA's most important provision," *Hart & Wechsler*, *supra*, at 1158, as a means of achieving that worthy goal. See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003); *Terry Williams* v. *Taylor*, 529 U.S. 362, 404 (2000). The principles of comity, finality, and federalism are not advanced, and are indeed offended, by an interpretation of Section 2254(d) that makes a state-court opinion the *sine qua non* of AEDPA deference.

Such an interpretation is premised on a dubious set of assumptions about state courts. At best, the denial of AEDPA deference to summary dispositions has been justified on the ground that federal courts are supposedly unable to determine whether a "claim [has been] adjudicated on the merits," 28 U.S.C. 2254(d), absent an opinion explaining the state court's decision. See 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 32.2, at 1574 & n.8 (5th ed. 2005). On this view, a federal habeas court assumes the state court avoided the merits unless there is written indication to the contrary. But habeas jurisprudence elsewhere adopts precisely the opposite default rule:

> Decisions * * * dealing with ambiguous state court rulings have established a presumption that the ambiguous state court decision rests on a denial of the claim on the merits and hence there is no procedural default barring habeas review, see *Harris* v. *Reed*, 489 U.S. 255 (1989), but the presumption can be rebutted, see *Coleman* v. *Thompson*, 501 U.S. 722 (1991); *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991).

Hart & Wechsler, *supra*, at 1290. As the law of procedural default illustrates, federal habeas courts should not assume that every state-court summary disposition failed to address claims on the merits. See, *e.g.*, *Schaetzle* v. *Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003).[1]

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[1] Not every summary disposition is opaque as to whether there has been a merits adjudication. Consider the state-court opinion that tersely rejects a federal claim as "without merit." To take another example, Texas courts use terms of art to indicate the nature of their decisions. See *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits."). Of course, if the circumstances of a given summary disposition show that the state court has not adjudicated the merits, AEDPA deference will not be appropriate under Section 2254(d). Cf. *Chadwick* v. *Janecka*, 312 F.3d 597, 606 (3d Cir. 2002) (Alito, J.) ("[I]f an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply.").

Refusal to give AEDPA deference to summary dispositions also betrays a troubling assumption that state courts do not write opinions because they are lazy or incompetent—so much so that they cannot be trusted to vindicate federal rights. Under this view, a state court must offer written proof that it is capable of "correctly identif[ying] the governing legal rule [and] appl[ying] it []reasonably to the facts of a particular prisoner's case," *Terry Williams*, 529 U.S. at 407-408, before AEDPA deference can be meted out by a federal court. See, *e.g.*, *Niederstadt* v. *Nixon*, 505 F.3d 832, 842-843 (8th Cir. 2007) (en banc) (M. Arnold, J., dissenting) ("I see no reason to encourage state courts to be laconic. * * * [I]f a state wants to claim the shelter that [AEDPA] provides, it has the burden to show that it is entitled to it."); *Delgado* v. *Lewis*, 223 F.3d 976, 981-982 (9th Cir. 2000) ("When a state court does not furnish a basis for its reasoning, we have no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context.").

Such negative assumptions about state courts are inappropriate. Regardless of the summary nature of a disposition, a federal court should "presum[e] that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). State judges, no less than their federal counterparts, are duty-bound to support the Constitution of the United States. See U.S. Const. art. VI (declaring that "all * * * judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution," and that "the Judges in every State shall be bound" by "the supreme Law of the Land"); *Stone* v. *Powell*, 428 U.S. 465, 493 n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."); *Brown* v. *Allen*, 344 U.S. 443, 499 (1953) (Frankfurter, J.) ("[State courts] are under the same duty as the federal courts to respect rights under the United States Constitution."); *Ex parte Royall*, 117 U.S. 241, 251 (1886) (Harlan, J.) (noting that state and federal courts are "equally bound to guard and protect rights secured by the constitution"). Absence of a written opinion does not signal a failure to carry out this constitutional duty, and "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 240 n.2 (1985); see also *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991) ("[W]e have no power to tell state courts how they must write their opinions.").[2]

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[2] In the habeas context, the esteem in which state courts are held is evident in the exhaustion requirement, now codified at 28 U.S.C. 2254(b)-(c). "The exhaustion requirement * * * serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth* v. *Serrano*, 454 U.S. 1, 3 (1981) (per curiam). Yet friction would be the natural product of a system in which state courts are made to consider federal claims by way of exhaustion, see 28 U.S.C. 2254(b)-(c), told that their decisions will receive deference, see 28 U.S.C 2254(d), and then informed that their summary dispositions do not make the grade—or that additional writing is required before federal courts will acknowledge their work.

Section 2254(d) confirms that federal habeas courts owe a duty of respect to the state courts. That provision "demands that state-court decisions be given the benefit of the doubt," *Visciotti*, 537 U.S. at 24, and forbids the skepticism about state-court competence described above. As this Court recently noted, "AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, No. 09-338, slip op. at 12 (U.S. May 3, 2010); cf. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451 (1963) ("What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the 'truth.'").

Amici States obviously do not oppose the practice of opinion writing. State-court opinions have always been useful to federal courts on habeas review. But Section 2254(d)(1) has substantially altered the role of state-court opinions in federal habeas proceedings. From the time of *Brown* v. *Allen*, 344 U.S. 443 (1953), until AEDPA's enactment, federal courts routinely relitigated federal constitutional questions that had been fully and fairly litigated in state court. See, *e.g.*, *Wright* v. *West*, 505 U.S. 277, 285-289 (1992) (plurality opinion of Thomas, J.); *Hart & Wechsler*, *supra*, at 1228. During this era of plenary habeas authority, a state court could only affect federal habeas outcomes by exercising the power to persuade—that is, by writing an opinion that a federal court would later approve as a correct statement of federal law. See *Brown*, 344 U.S. at 508

(Frankfurter, J.) ("Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination."); cf. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 165 n.125 (1970) ("When I am confident that the issue has received real attention and the state trial and appellate judges have been in accord among themselves, I see no sufficient reason to elevate my views over theirs in a close case. The main difficulty is when one cannot be sure that the state courts, or at any rate the state appellate courts, have focused on the issue. Greater writing of opinions, however brief and informal, would alleviate the problem." (citation omitted)).

But after AEDPA, a federal court may no longer grant habeas relief simply because, in its independent view, the state court's decision was incorrect on a point of federal law. See *Terry Williams*, 529 U.S. at 410-411. Congress's enactment of Section 2254(d)(1) reflects its judgment that the decisions of state courts are worthy of trust and deference.

The potential for friction between state and federal courts has long been recognized as a risk inherent to the enterprise of federal habeas review. See *Darr* v. *Burford*, 339 U.S. 200, 204 (1950) ("[S]ince the 1867 statute granted jurisdiction to federal courts to examine into alleged unconstitutional restraint of prisoners by state power it created an area of potential conflict between state and federal courts."). Section 2254(d) should not be given an interpretation that aggravates the old problems it was meant to solve. AEDPA deference applies to summary dispositions of state courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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